TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 248.

KINGMAN & COMPANY, PLAINTIFF IN ERROR,

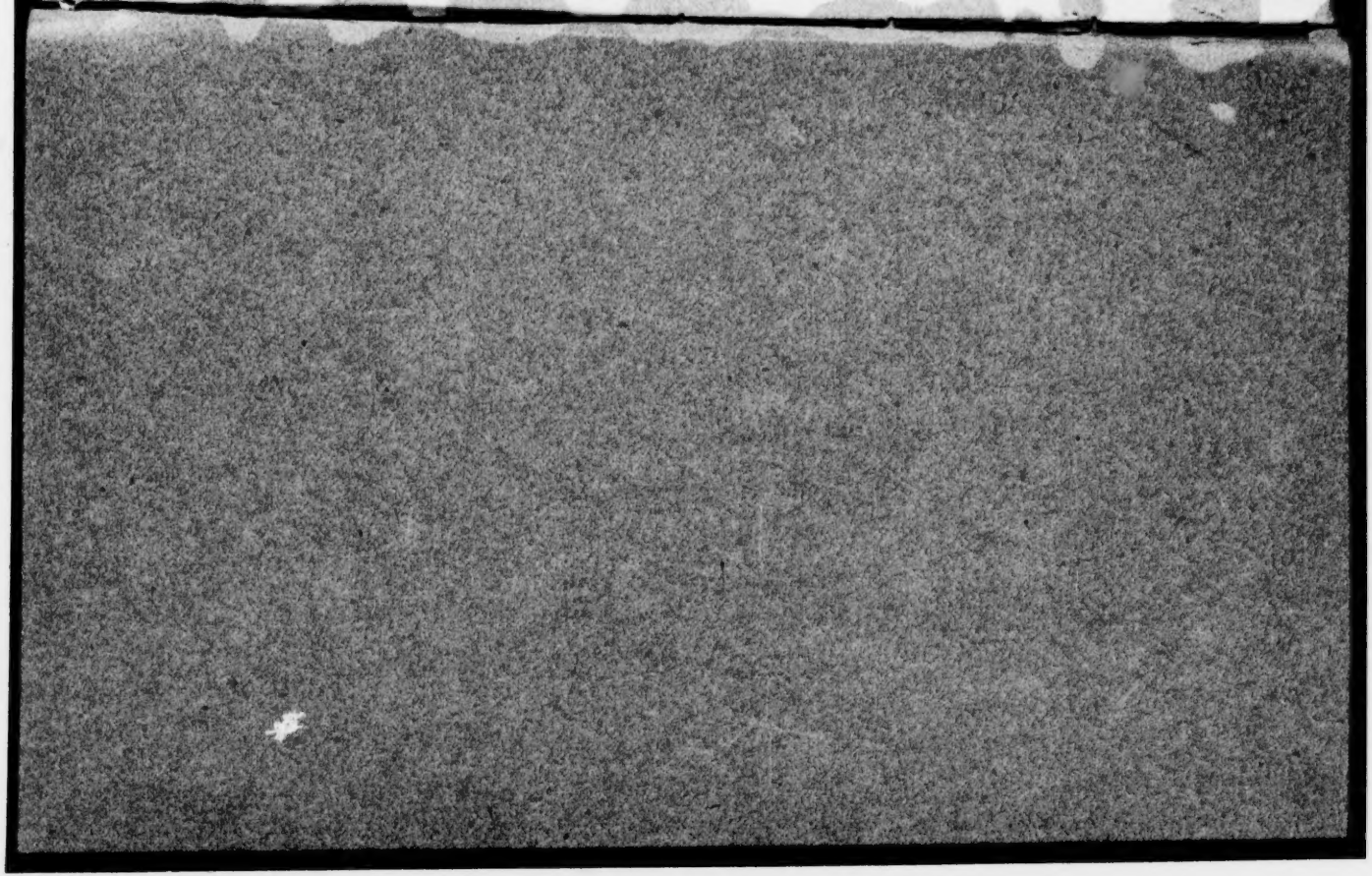
vs.

THE WESTERN MANUFACTURING COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI FILED OCTOBER 19, 1897.
CERTIORARI AND RETURN FILED NOVEMBER 7, 1897.

(16,414.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 6, 1897.

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a Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the May term, 1896, of said court, begun and held at the United States court-house, in the city of St. Paul, Minnesota, on the first Monday in May, to wit, the fourth day of May, A. D. 1896, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn, and Honorable Amos M. Thayer, circuit judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the fourteenth day of March, A. D. 1896, a transcript of record, in pursuance to a writ of error directed to the circuit court of the United States for the district of Nebraska, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit in the case of Kingman and Company, plaintiff in error, *vs.* The Western Manufacturing Company, defendant in error; which said transcript of record, as printed for the use of the court on the hearing of said case, is in the words and figures following, to wit:

1 In the United States Circuit Court of Appeals for the Eighth Circuit.

KINGMAN & COMPANY, Plaintiff in Error,
vs.
THE WESTERN MANUFACTURING COMPANY, Defendant in Error.

The plaintiff in error thinks that the following parts of the record herein are sufficient and all that are necessary for the consideration of the errors assigned in this case, to wit:

1. The petition.
2. The amended petition.
3. The summons issued out of the State court, and the return thereon.
4. Petition for removal.
5. Bond for removal.
6. Order of removal.
7. Certificate of clerk of the district court of the State of Nebraska.
8. Summons issued out of the circuit court, May 12th, 1894, and the return thereon.
9. Leave to answer and reply, entered November 12th, 1894.
10. The answer.
11. The reply.
12. Entries of trial to jury, May 31st, and following days.
13. Order of dismissal of the first cause of action.
14. Entry of cause submitted.
15. The verdict.

16. The judgment.
17. Motion for a new trial.
18. Ruling on motion for a new trial, December 11th, 1895.
19. Time given to prepare bill of exceptions.
20. Bill of exceptions.
21. Petition for writ of error.
22. Assignment of errors.
23. Writ of error.
24. Bond and citation.
25. All indorsements on the foregoing parts of the record.
26. Clerk's certificate and return to writ of error.

KINGMAN & COMPANY,
By JAMES H. McINTOSH,
Its Attorney.

2 STATE OF NEBRASKA, } ss:
Lancaster County, }

Cy. Smith, of lawful age being by me first duly sworn, deposes and says that on Wednesday, the 5th day of February, 1896, at the request of the plaintiff in error, he served the foregoing statement on The Western Manufacturing Company, defendant in error, by delivering to W. J. Lamb, one of the members of the firm of Lamb & Adams, attorneys for the said defendant in error, a true copy thereof, at the offices of said attorneys in Lincoln, Lancaster county, Nebraska.

Notarial Seal Chas. L. Burr, Lincoln, Lancaster County, Nebraska.

CY. SMITH.

Subscribed in my presence, and sworn to before me, this 5th day of February, 1896.

CHAS. L. BURR,
Notary Public.

My commission expires May 21", 1897.

United States circuit court of appeals, eighth circuit. Kingman & Company, plaintiff in error, *vs.* Western Manufacturing Company, defendant in error. Statement of parts of record which plaintiff in error thinks necessary for the consideration of the errors assigned. James H. McIntosh, attorney for plaintiff in error. Filed Feb. 8, 1896. John D. Jordan, clerk.

Pleas before the Honorable Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, sitting in the circuit court of the United States for said district of Nebraska, within the eighth judicial circuit, at the term of May, A. D. 1895.

3 Be it remembered, that on the 5th day of April, 1894, a transcript from Lancaster county court was filed in the clerk's office of said circuit court; which said transcript is in the words and figures following, to wit:

Transcript.

Pleas in the district court of the third judicial district of Nebraska in and for the county of Lancaster.

At the January, A. D. 1894, term of said court, begun and held in the city of Lincoln, in said county and State, on the 29th day of January, in the year of our Lord one thousand eight hundred and ninety-four, and on a day therein, to wit, on the 15th day of March, A. D. 1894 (that being the 39th judicial day of said January, A. D. 1894, term of said court)—present, Honorable Jesse B. Strode, judge presiding; Fred. A. Miller, sheriff, and E. Baker, clerk—the following proceedings among others were had and done, to wit:

Be it remembered, that at the several times hereinafter set forth, were filed in the office of the clerk of said court papers of which the following are true and correct copies, and proceedings were had and done in the cause below named, as follows, to wit:

Petition.

In the District Court of Lancaster County, Nebraska.

THE WESTERN MANUFACTURING COMPANY, Plaintiff,
vs.
KINGMAN AND COMPANY, Defendants.

The plaintiff complains of the defendants and for cause of action says that the plaintiff is a corporation doing business under the laws of the State of Nebraska, and the defendant is a corporation doing business under the laws of the State of Illinois; that on the 8th day of May, 1893, the plaintiff made an agreement with the defendant to sell the defendant one hundred and sixty (160) mowers at the following prices: four-feet-six-inches mowers $25 each, five-feet mowers at $26 00 each; that the same were manufactured by the Western Manufacturing Company and were to be delivered between May 8th and October 1st, 1893; that the plaintiff has manufactured them and tendered the delivery of the same to the defendants; that the defendants have refused to accept or pay for the same.

Second Cause of Action.

That on the 8th day of May, 1893, the plaintiff sold to the defendant one thousand eight hundred Def-ance corn-shellers *to* the following prices: with fan and feed-table $4.35 each; without
4 fan and feed-table $4.00 each; that the plaintiff manufactured the same and had them ready to be delivered to the defendant and tendered the same to them; that they refused to accept the same, whereby an action hath accrued to the plaintiff.

Third Cause of Action.

That on the 8th day of May, 1893, the plaintiff made an agreement with the defendant whereby the plaintiff sold to the defendant 1,200 Climax end gates at $1.25 each; that the plaintiff manufactured the same and tendered the delivery of the same to the defendant; that the defendant refused to accept the same, whereby an action hath accrued to the plaintiff.

Fourth Cause of Action.

That at the time the plaintiff- made the said contract they had an established trade in the above-named agricultural implements throughout the States of Kansas, Nebraska, Iowa and other Western States, which was of great value and for the establishment of the — plaintiff had expended large sums of money and that therefore it was agreed between the plaintiff and the defendant- that they would take from the plaintiff all of the States and territory and that they would sell as many of the plaintiff's agricultural implements in said States and territory in good faith as could be done and that thereupon the said plaintiffs turned over to the defendants all the said territory upon the execution of the said contract and the defendant- thereupon agreed that they would buy of the plaintiff all the goods and agricultural implements of the above character that could be sold in the said States and territory during the continuance of the said contract, which was for the period of one year. That the said defendants did not perform their said contract but on the contrary fraudulently introduced other machinery in place of that manufactured by the plaintiff and absorbed and kept the territory to their own use, to the damage of the plaintiff in the sum of $10,000.00.

Wherefore plaintiff demands judgment against the said defendant in the sum of $20,000.00.

LAMB, ADAMS & SCOTT,
Plaintiff's Attorneys.

STATE OF NEBRASKA, }
Lancaster County, } ss:

M. D. Welch, being first duly sworn, says he is the agent of the plaintiff corporation and that he believes the facts stated in the foregoing petition to be true.

M. D. WELCH.

Subscribed in my presence and sworn to before me this 17th day of February, 1894.

[SEAL.]

W. W. KERLIN,
Deputy Clerk Dist. Court.

Indorsed: The Western Mfg. Co. *vs.* Kingman & Company. Petition. Clerk's office, district court. Filed Feb. 17, 1894. E. Baker, clerk dist. court.

Summons.

STATE OF NEBRASKA, } ss:
Lancaster County, }

The State of Nebraska to the sheriff of said county, Greeting:

You are hereby commanded to notify Kingman & Company, defendant, that they have been sued by The Western Manufacturing Company, plaintiff, in the district court of the third judicial district in and for said county of Lancaster, and that unless they answer by the 19th day of March, A. D. 1894, the petition of said Western Manufacturing Company, plaintiff, filed against them in the clerk's office of said court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this summons on or before the 26th day of February, A. D. 1894.

Witness my hand and seal of said court, at Lincoln, this 17th day of February, A. D. 1894.

E. BAKER, *Clerk,*
[SEAL.] By W. W. KERLIN, *Deputy.*

Indorsed: Summons. District court, Lancaster county. No. —, doc. 10, page 135. The Western Manufacturing Co., plaintiff, *vs.* Kingman and Co., defendant. If defendant fail to appear and answer, the plaintiff will take judgment for $20,000.00, together with interest thereon from Febr'y 17th, 1894, and costs of suit. Attest: E. Baker, clerk, by W. W. Kerlin, deputy. Returnable Feb. 26th, 1894. Lamb, Adams and Scott, plaintiff's attorney-.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

I hereby certify that on the 17th day of February, 1894, I served the within writ of summons on the within-named Kingman and Company, by delivering R. W. Fisk, agent of said company, a true and certified copy of this writ with all indorsements thereon as required by law.

FRED. A. MILLER, *Sheriff,*
By JOHN LINDLOFF, *Deputy.*

6 *Fees.*

Service and return	$ 50
Copy	25
Mileage	10
Total	$ 85

Clerk's office, district court. Filed Feb. 23, 1894. E. Baker, clerk dist. court.

Amended Petition.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

In the District Court of Lancaster County, Nebraska.

THE WESTERN MANUFACTURING COMPANY, Pl'ff,
vs.
KINGMAN & COMPANY, a Corporation Doing Business and Incorporated under the Laws of the State of Illinois, Def't.

Amended petition.

The above-named plaintiff complains of the above-named defendant and for cause of action states:

1st. That it now is, and at all times herein mentioned hath been a manufacturing corporation duly organized and doing business under the laws of the State of Nebraska.

2nd. That the defendant now, and at all times herein mentioned hath been and now is a non-resident corporation organized and doing business under the laws of the State of Illinois.

First Cause of Action.

And for its first cause of action, this plaintiff complains and says that at all times herein mentioned it hath been a manufacturing company with its principal place of business and manufacturing at Lincoln, Nebraska, and has been extensively engaged in there manufacturing large quantities of agricultural implements known as Standard mowers, Defiance hand corn-shellers, and Climax end gates; and selling and distributing the same at wholesale throughout the States hereinafter mentioned.

That prior to the 8th day of May, 1893, they had in their said business by great diligence, labor, and expense, and by sending out many travelling salesmen, and introducing and selling their said manufactured goods, established agencies, and a large, extensive, and valuable trade and business in the sale of each
7 and all of the above-described articles so manufactured by them throughout the (*the*) States of Illinois, Missouri, Kansas, Nebraska, Iowa, South Dakota, Indian and Oklahoma Territories. That by and through such trade so established, this plaintiff was able to continue to manufacture and sell large quantities of each of the said several agricultural implements aforesaid during each and every year at great profit to themselves in the manufacture and sale of the same; and that their trade so established in the said several agricultural implements, was to this plaintiff and to the defendant at the time of the making of the contract hereinafter mentioned, of great value; and that if the said defendants had performed their contract in that behalf then made by them, it would have continued to have been, and would have been at the

time of the breach of their contract by the said defendants and now, of great value to these plaintiffs. And these plaintiffs aver the fact to be that on or about the eighth day of May, 1893, these plaintiffs entered into an agreement with the said defendants whereby these plaintiffs agreed with the said defendants to continue the manufacture of the aforesaid agricultural implements in such amount and quantities as would supply the trade in the said several articles through the said several States and Territories aforesaid, and it was contemplated and agreed then between the plaintiff and the defendant, that then and thereby this plaintiff should have, receive and make large profits upon the manufacture of the said articles, and it was then and thereby agreed between the plaintiff and the defendant that the defendants should keep and receive from the plaintiffs all of their said established trade in the said several articles throughout the said several States and Territories aforesaid, and it was then and there agreed between the plaintiff and the defendant that the plaintiff should wholly discontinue its business of selling any of the aforesaid articles to be manufactured by them throughout all of the States and Territories aforesaid, and should withdraw all of their traveling salesmen from the road selling the said agricultural implements, and should withdraw and discontinue all appointments of agents in their trade that they had so established throughout the said territory, and that the defendants in place, lieu and stead thereof, should keep the whole of the said territory in the selling of each of the said several agricultural implements so manufactured and to be manufactured by this plaintiff, and thereupon in consideration of the premises, the said defendant agreed that during such time as this plaintiff would discontinue the sale of the manufactured articles throughout the aforesaid territory that they,
8 the said defendants, would fully keep and cover the same in making sales of the said several articles, and would in good faith keep up, continue, carry and fully maintain all the trade which the said plaintiffs had established in the said several agricultural implements throughout the said several States and Territories aforesaid, purchasing all the said goods of the plaintiff at prices then agreed upon, and that this plaintiff should not sell the said manufactured articles throughout the said territory to any other person or persons than the said defendants, and that the said defendants would so conduct, carry on and manage the said business that the said valuable trade so established by this plaintiff should not only be continued, kept up and maintained, but should be, during the continuance of the exclusive sale of the said goods by the said defendants, be increased so that upon the termination of the said contract, the plaintiff's trade in the said agricultural implements throughout the said States and Territories so established by them, should be maintained and return- to them at the expiration of their exclusive sale of the said goods so that they might enjoy the use and value thereof.

And this plaintiff further avers that they on their part fully performed the said contract, withdrew all of their agents throughout the said territory, and withdrew all of their traveling men from the

road, and continued the manufacture of the said several agricultural implements, and were ready to manufacture and deliver the same in sufficient quantities to supply the trade throughout the whole of said Territory conformable to the said agreement. But the plaintiff avers that the defendant did not perform its contract in any respect on its behalf, but on the contrary they fraudulently and wrongfully, having obtained the exclusive sale of the said plaintiff's goods throughout the said territory, used the same for the mere purpose of excluding competition with other goods which the said defendants were selling throughout the territory aforesaid. That they did not keep up or make any effort to keep up and maintain the trade which these plaintiffs had established throughout the said territory as they so agreed, but on the contrary fraudulently wholly withheld the sale of the plaintiff's goods through all of the territory aforesaid, and fraudulently introduced and sold their competing goods owned and sold by them in lieu thereof, and thereby prevented the plaintiff from making any profit in its manufacture of the said articles or the sale thereof to the defendant or other persons. That the defendants wholly refused and neglected to purchase the said goods of the plaintiff, and wholly neglected and refused to keep the same introduced and sold throughout the said terri-
9 tory in conformity to their said agreement; but taking advantage of their said contract with the plaintiff, wholly displaced and supplanted the plaintiff's trade throughout all of the States and Territories in the said manufactured articles, with competing goods introduced and sold by the said defendants. That said defendants did not, when they broke and terminated their contract as hereinafter set forth, return to the plaintiff or maintain the trade in the said several articles throughout the States and Territories aforesaid, but the same together with all the profits contemplated by the said contract was and is wholly lost to the plaintiff by the said wrongful acts of the said defendants aforesaid.

And the plaintiff further says that during the time the said contract was in force and this plaintiff was thereby prevented from selling goods throughout the said territory, they thereby lost the manufacture and sale throughout the said territory of about six hundred mowers; four thousand corn-shellers; four thousand Climax end gates (which the said defendant could and would have sold in said territory if they had kept and performed their agreement), at a profit upon each of the same in the manufacture thereof to the plaintiff as follows: upon the mowers of $5.00 each; upon the corn-shellers of $1.60 each; upon the Climax end gates of 30 cents each, which in the aggregate amounts to the sum of $10,600 and that plaintiff wholly lost their trade so established in the said articles throughout the said territory by reason of and through the said breach of the said contract by the said defendant which was of the value of $5,000.

Second Cause of Action.

And the plaintiff for its second cause of action against the defendants says that on the 8th day of May, 1893, the plaintiff entered

into a contract in writing with the defendant, a copy of which is filed herewith, whereby it was agreed between this plaintiff and the said defendant that this plaintiff give the said defendant the exclusive sale for the period of one year from that date, in the States of Illinois, Missouri, Kansas, Nebraska, Iowa, South Dakota, and Indian and Oklahoma Territories, of its Kingman and Weir Standard mowers and certain other goods not material hereto then being manufactured by this plaintiff, in consideration whereof the said defendant then agreed to order and purchase from this plaintiff 160 of the Standard mowers which this plaintiff agreed to manufacture and deliver to the defendant at the following prices, viz: 4 ft. and 6 in. mowers at $25 each; 5 ft. mowers at $26 each.

And the said defendant agreed to order and purchase all of the same of the plaintiff before the first day of Oct., 1893.

That the plaintiff performed the said agreement in all respects on its part, gave the plaintiff the exclusive sale of the said mowers and other goods in all of said States and Territories, and manufactured and had ready to deliver, and tendered the delivery thereof to the said defendant of all the said 160 mowers contracted for aforesaid; but plaintiff avers that the said defendant did not in any respect perform its said agreement on its part, but wholly refused and neglected so to do, and did not order or purchase any of the said mowers whatever of the plaintiff except 54 in number, but left all of the same at the end of the season of 1893, so manufactured by the plaintiff on its hands unsold, the said defendant having supplied the trade for which the said goods were manufactured and contemplated to be filled by the said contract, with other mowers manufactured by other persons.

And this plaintiff avers the fact to be that the said Standard mowers so left upon the hands of this plaintiff at the end of the season of 1893, were not on Oct. 1st, 1893, nor yet have they been at any time since saleable at any price in the market, nor were they nor have they been at any time since, nor are they now of any value greater than about the sum of ten dollars each.

Whereby an action hath accrued to this plaintiff against the said defendant upon the said contract for the sum of $1,590.00 with interest thereon from the first day of Oct., 1893.

Third Cause of Action.

And this plaintiff for its third cause of action against the defendant complains and says that on the 8th day of May, 1893, this plaintiff entered into a contract in writing with the said defendant, a copy of which is filed herewith, whereby this plaintiff gave the said defendant the exclusive sale for one year from the date thereof, of all the Defiance hand corn-shellers manufactured by the plaintiffs at Lincoln, Nebraska, for the territory covered by the States of Illinois, Missouri, Kansas, Nebraska, Iowa, South Dakota, Indian and Oklahoma Territories, in consideration whereof the said defendant then agreed to order and purchase of this plaintiff between the 8th of May, 1893, and before the 8th day of May, 1894, eighteen hundred (1,800) De-

fiance corn-shellers at the following prices: with fan and feed-
11 table, $4.35 each; without fan and with feed-table $4.00 each;
which this plaintiff agreed to manufacture and deliver to the said defendants at the foregoing prices. That the said defendant ordered about four hundred (400) of the said corn-shellers, which the plaintiff furnished and delivered, and that then, thereupon on or about the month of Oct., 1893, the said defendant broke and terminated the said contract, and refused in any manner further to perform the same; refused to make any further order of the said goods, or to accept or receive or pay for the same. That the plaintiff was ready to perform, and fully performed and tendered performance on *his* part of the said agreement in all respects, and gave the said defendant the exclusive sale of the said corn-shellers throughout the territory aforesaid, yet the said defendant did not in any respect other than as aforesaid, perform its said agreement on its part, but neglected and refused so to do, and refused to order or purchase the balance or residue of the said corn-shellers, and left all of the same so manufactured upon the hands of this plaintiff, while the said defendant supplied the trade in the market with corn-shellers of other manufactures than those of the plaintiff.

And this plaintiff avers the fact to be that at the time of the breach of the said agreement as aforesaid by the said defendant, the said corn-shellers were not saleable in the market, and that the dealers in the same throughout the territory aforesaid had all their stock of corn-shellers and were fully supplied, so that at the time of the breach of the said agreement by the said defendant, and thence hitherto the said corn-shellers have not been saleable in the market at a greater price than about $2.50 each, nor were they in the market of any greater value than said last-named sum.

Whereby an action hath accrued to this plaintiff in the sum of $2,450 with interest thereon from Oct., 1893.

Fourth Cause of Action.

This plaintiff further complaining for its fourth cause of action against the said defendant says that on the 8th day of May, 1893, the plaintiff entered into a contract in writing with the said defendant a copy of which is filed herewith, whereby it was agreed between this plaintiff and the said defendant that this plaintiff give the said defendant the exclusive sale for the period of one year from that date in the States of Illinois, Missouri, Kansas, Nebraska, Iowa, South Dakota and Indian and Oklahoma Territories, of the Climax end gates then being manufactured by the plaintiff, in considera-
tion whereof the said defendant then agreed to order between
12 the first day of Aug. and the first day of Dec., 1893, at the
price of $1.25 each, twelve hundred of the said Climax end gates. That the plaintiff performed its said agreement in all respects on its part and gave the said defendant the exclusive sale of the said Climax end gates and said other goods, in all the States and Territories aforesaid, and manufactured and had ready to be delivered and tendered the delivery of all the said twelve hundred end

gates to the said defendant. That the plaintiff says that the said defendant did not in any respect perform its said agreement on its part, but wholly neglected and refused so to do; nor did the said defendant order or purchase any of said end gates at any time, but left all the same so ready and manufactured by this plaintiff upon its hands while the said defendant supplied the said market and the said trade throughout the said territory with end gates of other manufacture.

And this plaintiff avers the fact to be that the said defendant terminated and broke the said contract and refused to perform the same, or to be further bound thereby, on or about the month of Oct., 1893, and that at the time of the said breach of the same, the market and the dealers throughout the said territory were fully stocked and supplied with end gates manufactured by other persons, so that there was no market for the sale of the same at any price, and they were not then, nor have they thence hitherto been marketable or saleable or of any greater value than about the sum of 50 cts. each.

Whereby an action hath accrued to this plaintiff against the said defendant for the sum of $900 with 7 per cent. interest thereon from Oct., 1893.

Wherefore the plaintiff demands judgment against the said defendant for the sum of eighteen thousand nine hundred & ninety dollars and costs of suit.

LAMB, ADAMS & SCOTT,
Pl'ff's Att'ys.

THE STATE OF NEBRASKA, } ss:
Lancaster County, }

Merritt D. Welch being first duly sworn on oath says that he is the managing agent of the plaintiff corporation. That he has read the foregoing amended petition and believes the facts stated therein to be true.

MERRITT D. WELCH.

Subscribed in my presence and sworn to before me this 13th day of March, 1894.

[SEAL.]

A. W. SCOTT,
Notary Public.

13 Indorsed: The Western Manufacturing Company *vs.* Kingman & Company. Amended petition. Clerk's office, district court. Filed Mar. 13, 1894. E. Baker, clerk dist. court.

* * * * * * *

Petition for Removal to Circuit Court.

In District Court, Lancaster County, State of Nebraska.

THE WESTERN MANUFACTURING COMPANY, Plaintiff,
vs.
KINGMAN & COMPANY, Defendant.

Petition for removal of this cause to the United States circuit court for the district of Nebraska.

To the honorable the district court of Lancaster county, State of Nebraska:

Your petitioner, Kingman & Company by James H. McIntosh, its attorney now comes and respectfully represents to this court, that this court has not acquired jurisdiction over this defendant by the pretended service of summons upon it said summons pretending to have been served upon this defendant by delivering a copy of the original thereof to one R. W. Fisk, who at the time of the said delivery of the copy thereof to him was not either the president or the chairman of the board of directors or trustees or other chief officer of this defendant nor was he this defendant's cashier treasurer secretary, clerk or managing agent; nor was said summons served upon said Fisk at the office of this defendant or at defendant's usual place of doing business in the State of Nebraska, nor did the said Fisk there and then or theretofore or since represent this defendant in any capacity whatsoever except that the said Fisk was known as a traveling man for this defendant going from place to place and from town to town and from city to city to take orders for goods for this defendant being a special agent for that purpose and without any other authority or employment whatsoever and that when said pretended service was made upon this defendant by delivering said copy of said summons to the said Fisk he was there and then temporarily in the city of Lincoln in said Lancaster county in the State of Nebraska, upon his said business as traveling man and salesman having arrived in said city on the day of said pretended service and intending to leave said city for other points in other counties in the State of (*of*) Nebraska, on the next day after said date of said pretended service or as soon thereafter as his said special business as traveling salesman for this defendant should be finished in the said city of Lincoln.

14 Wherefore this defendant now does and at all times hereafter will object and protest that jurisdiction has not been acquired over this defendant in this cause and hereby saves and reserves unto itself the right to bring the said question of the jurisdiction over this defendant before the court at the proper time and place there and then to have judgment of said court on said question of jurisdiction; nevertheless this defendant not entering its appearance herein nor otherwise recognizing the jurisdiction of said court over it except for the special purpose of removing this cause to the circuit court of the United States for the district of Nebraska, there

and then and in said court to have said question of the jurisdiction over this defendant duly adjudicated and for all other purposes in case said jurisdiction should be sustained.

Therefore your petitioner respectfully shows to this honorable court that this is a suit of a civil nature at law of which the circuit courts of the United States are given jurisdiction by an act of the Congress of the United States duly passed and approved March 3rd, 1887, and the acts supplementary thereto and amendatory thereof. That the matter and amount in (dispute) in said cause exceeds exclusive of interest and costs the sum or value of two thousand dollars.

That the controversy in said suit is wholly between citizens of different States and that your petitioner the defendant Kingman & Company in the above-entitled suit was at the time of the commencement of said suit and still is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois and then to wit: at the commencement of this suit was and still is a citizen and an inhabitant and a resident of the said State of Illinois, having its principal offices and place of business and its said place of residence in the city of Peoria in said State of Illinois and then was and still is a non-resident of the State of Nebraska.

And that the plaintiff The Western Manufacturing Company was at the time of the commencement of this suit and still is a corporation duly organized and existing under and by virtue of the laws of the State of Nebraska, and then, to wit: at the commencement of this suit was and still is a citizen and an inhabitant and a resident of said State of Nebraska, having its principal offices and place of business and its said residence in the city of Lincoln, Lancaster county in the State of Nebraska and is not and was not at the commencement of this suit either a citizen inhabitant or resident of the State of Illinois.

And your petitioner further represents that it has a good de-
15 fense to said suit to wit: said question of jurisdiction acquired over this defendant by the pretended service of summons upon defendant as hereinbefore stated, and in addition thereto if it shall be found that jurisdiction has been acquired over this defendant in this cause this defendant has a good defense to the alleged several causes of action set forth in the plaintiff's petition, to wit:

As to said first cause of action that the facts stated and allegations therein made are not true.

That as to said alleged second cause of action this defendant denies each and every allegation thereof.

That as to said alleged third cause of action this defendant denies each and every allegation thereof.

And as to said alleged fourth cause of action that this defendant denies each and every allegation thereof.

That this defendant has a further defense to the several alleged causes of action in said petition, to wit: that a certain writing was entered into between said parties incorrectly described in said petition but believed to be the same writing referred to therein; that the said plaintiff failed, neglected and refused to perform the obli-

gations imposed upon it by said writing, although this defendant was at all times ready, willing and able and duly offered to perform the (*the*) obligations in said writing imposed upon said defendant, but that on account of the failure, neglect and refusal of said plaintiff to perform said obligations in said writing on its part said written agreement and the mutual obligations contained therein were duly rescinded and cancelled.

And your petitioner offers and files herewith a good and sufficient bond with a good and sufficient surety thereon for its entering in the circuit court of the United States for the district of Nebraska, on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein except to make the order of removal required by law, and to accept the said surety and bond and to cause the record herein to be removed into said circuit court of the United States for the district of Nebraska.

And your petitioner will ever pray.

KINGMAN & COMPANY,
By JAMES H. McINTOSH,
Its Attorney.

16 UNITED STATES OF AMERICA, }
State of Nebraska, County of Douglas, } *ss:*

NEW YORK LIFE BUILDING, OMAHA, NEB.

James H. McIntosh being first duly sworn deposes and says that he is the attorney for the above-named defendant; that said defendant is a corporation and that he believes the facts stated in the foregoing petition are true.

JAMES H. McINTOSH.

Subscribed in my presence and sworn to before me this 5th day of March, 1894.

JOHN WILSON BATTIN,
[SEAL.] *Notary Public.*

My commission expires January 2, A. D. 1897.

Indorsed: In the district court, Lancaster county, State of Nebraska. The Western Manufacturing Company, plaintiff, *vs.* Kingman & Company, defendant. Petition for removal of this cause to the United States circuit court for the district of Nebraska. Clerk's office district court. Filed Mar. 15, 1894. E. Baker, clerk dist. court.

Bond on Removal.

In the District Court, Lancaster County, State of Nebraska.

THE WESTERN MANUFACTURING COMPANY, Plaintiff,
vs.
KINGMAN & COMPANY, Defendant.

Bond on removal.

Know all men by these presents that Kingman & Company, of Peoria, Illinois, by James H. McIntosh, its attorney, as principal, and Amaziah L. Carson, as surety, are holden and stand firmly bound unto the Western Manufacturing Company in the penal sum of one thousand dollars for the payment whereof well and truly to be made unto the said The Western Manufacturing Company, its successors and assigns, we bind ourselves, our heirs, representatives, successors, and assigns, firmly by these presents.

On condition, nevertheless, that whereas the said Kingman & Company has petitioned the district court of Nebraska, held in and for the county of Lancaster for the removal of a certain cause therein pending wherein the said The Western Manufacturing Company is plaintiff, and the said Kingman & Company is defendant to the circuit court of the United States in and for the district of Nebraska:

17 Now if the said Kingman & Company shall enter in the said circuit court of the United States for the district of Nebraska, on the first day of its next session a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto then this obligation shall be void otherwise it shall remain in full force and virtue.

In witness whereof the said Kingman & Company has hereunto caused its corporate name and seal to be affixed by James H. McIntosh its attorney; and Amaziah L. Carson has hereunto set his hand and seal this 2nd day of March, A. D. 1894.

KINGMAN & COMPANY. [SEAL.]
By JAMES H. McINTOSH,
Its Attorney, Principal.
AMAZIAH L. CARSON, *Surety.*

STATE OF NEBRASKA, } ss:
County of Douglas, }

Amaziah L. Carson, being first duly sworn deposes and says that he is a citizen of Nebraska, and a resident of Douglas county thereof, that he is worth the sum of ten thousand dollars over and above all property exempt from sale upon execution.

AMAZIAH L. CARSON.

Subscribed in my presence and sworn to before me this 2nd day of March, A. D. 1894.

[SEAL.] JOHN WILSON BATTIN,
Notary Public.

My commission expires January 2, 1897.

STATE OF NEBRASKA, } ss:
County of Douglas, }

On this 2nd day of March, A. D. 1894, in the county of Douglas and State of Nebraska, before me John Wilson Battin, a notary public, duly appointed, commissioned, qualified for and residing in said county and State personally appeared the above-named James H. McIntosh who is personally known to me and known to me to be the individual described in the foregoing instrument as attorney for Kingman & Company and he executed the foregoing instrument in the name of Kingman & Company and he there and then acknowledged that he executed the foregoing bond in the name
18 of the said Kingman & Company as its duly authorized attorney and that the same was the voluntary act and deed of the said Kingman & Company. Also there and then personally appeared the said Amaziah L. Carson, who is personally known to me to be the identical person described in and who executed the foregoing bond as surety, and he there and then acknowledged that he executed said bond as surety and that it was and is his voluntary act and deed.

JOHN WILSON BATTIN,
[SEAL.] *Notary Public.*

My commission expires January 2, A. D. 1897.

The above bond and the surety thereon approved this 15th day of March, 1894.

J. B. STRODE,
Judge of the District Court of Nebraska,
for Lancaster County.

Approved at 10.45 a. m.

Indorsed: In the district court, Lancaster county, State of Nebraska. The Western Manufacturing Company, plaintiff, *vs.* Kingman & Co., defendant. Bond on removal. Clerk's office, district court. Filed Mar. 15, 1894. E. Baker, clerk dist. court.

Order of Removal.

THE WESTERN MANUFACTURING COMPANY, Plaintiff, }
vs.
KINGMAN & COMPANY, Defendant. }

This cause coming on to be heard upon the petition of the defendant for the removal thereof into the circuit court of the United States for the district of Nebraska, and it appearing to this court

that the amount in dispute in said cause exceeds exclusive of interest and costs the sum or value of two thousand dollars; and that the controversy therein is between citizens of different States and the said defendant petitioner having made and filed herein with its said petition a bond with good and sufficient surety conditioned according to the laws of the United States for removal of causes from the State to Federal courts on the ground of diverse citizenship:

It is therefore considered by the court that said petition and bond be and they are hereby accepted and it is hereby ordered that said cause proceed no further in this court and that removal thereof into the circuit court of the United States for the district of Nebraska, be allowed as prayed in the said defendant's petition.

19 Dated at Lincoln, Nebraska, M'ch 15, 1894, at 10.45 in the forenoon.

J. B. STRODE, *Judge.*

Indorsed: Western Mfg. Co. *vs.* Kingman & Co. Order of removal. Clerk's office, district court. Filed Mar. 15, 1894. E. Baker, clerk dist. court.

* * * * * * *

Certificate.

THE STATE OF NEBRASKA, }
Lancaster County, } *ss:*

I, E. Baker, clerk of the district court, third judicial district of Nebraska, in and for said county, do hereby certify that the above and foregoing are true and correct copies of all papers filed, with all the indorsements on each, together with all proceedings had in our said court, in a cause therein wherein The Western Manufacturing Company is plaintiff and Kingman and Company are defendants, as the same appears fully upon the records and files of said court, and now in my charge remaining as clerk aforesaid.

In testimony whereof, I have hereunto set my hand [SEAL.] officially and attached the seal of said court, at Lincoln, this 23rd day of March, A. D. 1894.

E. BAKER, *Clerk D. C.,*
By J. D. HARRIS, *Deputy.*

Trans. fee, $10.00.

* * * * * * *

Thereupon afterwards, to wit, on the 12th day of May, 1894, a summons was duly issued in said case and returned and filed May 12, 1894, which said summons is in the words and figures following, to wit:

UNITED STATES OF AMERICA, }
District of Nebraska, } *ss:*

The President of the United States of America to the marshal of the district of Nebraska, Greeting:

You are hereby commanded to notify the defendant Kingman & Company that it has been sued by the Western Manufacturing Company in an action commenced in the district court of Lancaster county, State of Nebraska, which action has been removed to and is now pending in the circuit court of the United States for the district of Nebraska, aforesaid, at Omaha, Nebraska, that unless it answer by the 11th day of June, A. D. 1894, the amended petition of the said plaintiff, filed against it and included in the transcript on removal, in the clerk's office of said circuit court, said petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 21st day of May, A. D. 1894.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 12th day of May, A. D. 1894, and in the 118th year of the Independence of the United States of America.

[SEAL.]

Attest: ELMER D. FRANK, *Clerk.*

Attached to said summons is the return of the marshal in the words and figures following, to wit:

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 12th day of May, 1894, I received this summons, and on the 12th day of May, 1894, I served the same upon the within-named Kingman & Company by A. L. Carson, managing agent of said company in Douglas county, State and district of Nebraska, by delivering to and leaving with him a certified copy thereof with all the endorsements thereon.

FRANK E. WHITE,
United States Marshal for the District of Nebraska.

Upon the back of said summons appear indorsements in the words and figures following, to wit: No. 226 doc. Q. United States circuit court, district of Nebraska. The Western Manufacturing Company *vs.* Kingman & Company. Summons. Amount claimed of the defendant by the plaintiff is $18,990.00 together with interest & costs. Filed May 12, 1894. Elmer D. Frank, clerk. Montgomery, Charlton & Hall, Lamb, Adams & Scott, att'ys for pl'ff.

Marshal's Costs.

Service	$2 00
Mileage	12
Total	$2 12

* * * * * * *

Thereupon afterwards, to wit, at the November, 1894, term of said court, and on the 12th day of November, 1894, the following proceedings were had and done in said case as appears of record on folio 162, Journal "T," of said court, to wit:

21

WESTERN MANUFACTURING COMPANY
vs.
KINGMAN & COMPANY. } 226, Q.

This cause coming on for hearing on the motion of the defendant to reform the pleadings herein, was argued and submitted to the court by attorneys for the respective parties, whereupon after careful consideration thereof, it is now on this day ordered and adjudged by the court that it be, and the same is hereby, overruled. Defendant is granted leave to answer in ten days and plaintiff ruled to reply in fifteen days from this date.

* * * * * * *

Thereupon afterwards, to wit, on the said 22nd day of November, 1894, answer of Kingman & Company was filed in said case, which said answer is in the words and figures following, to wit:

Answer.

In the Circuit Court of the United States for the District of Nebraska.

THE WESTERN MANUFACTURING COMPANY, Plaintiff,
vs.
KINGMAN & COMPANY, Defendant. }

Comes now the above-named defendant, Kingman and Company, and for an answer to the amended petition of the plaintiff on file herein, admits that the plaintiff is a corporation organized and doing business under the laws of the State of Nebraska, and that the defendant is a corporation, organized and doing business under the laws of the State of Illinois; and for

Answer to Plaintiff's First Cause of Action.

This defendant submits that the said alleged first cause of action does not state facts sufficient to constitute a cause of action, and prays all such benefit and advantage as if the defendant had demurred thereto, and for answer thereto says that it denies each and every allegation therein contained.

Answer and First Defense to Plaintiff's Second Cause of Action.

For answer to said alleged second cause of action, this defendant says that the said alleged second cause of action does not
22 state facts sufficient to constitute a cause of action, and prays all such benefit and advantage as if the defendant had demurred thereto, and for answer thereto admits that on the 8th day

of May, 1893, it entered into a contract with the plaintiff and that the alleged copy thereof filed with the plaintiff's amended petition is a substantially correct copy thereof, and denies each and every allegation in the alleged second cause of action contained, not hereinbefore admitted to be true.

Answer and Second Defense to Plaintiff's Alleged Second Cause of Action.

Defendant further says for a second defense to said alleged second cause of action that, by the mutual consent and agreement of the several parties to said contract, the performance thereof, at or before the days named therein, was duly waived; that heretofore, to wit, at sundry times prior to the 15th day of December, 1893, the said defendant gave repeated orders to the said plaintiff for goods under the contract described in the second cause of action of the plaintiff's petition; that the said plaintiff there and then and at all times failed and refused to fill said orders in manner and form as by said contract it had agreed to do, and on or about the 15th day of December, 1893, duly notified this defendant that it would make no further shipments under said contract and there and then and thereby repudiated and rescinded said contract, to which said repudiation and rescission thereof, this defendant on or about the 19th day of December, 1893, duly assented, and thereafter and on or about the 2nd day of January, 1894, a full and final settlement was had between the said plaintiff and the said defendant of all differences between them growing out of said contract and the amount of said differences was duly paid by this defendant to the plaintiff and was duly accepted by said plaintiff.

Answer and First Defense to Plaintiff's Alleged Third Cause of Action.

For answer to said alleged third cause of action, this defendant says that the said alleged third cause of action does not state facts sufficient to constitute a cause of action, and prays all such benefit and advantage as if the defendant had demurred thereto, and for answer thereto, admits that on the 8th day of May, 1893, it entered into a contract with the plaintiff and that the alleged copy thereof filed with the plaintiff's amended petition is a substantially correct copy thereof, and denies each and every allegation in the alleged third cause of action contained, not hereinbefore admitted to be true.

23 *Answer and Second Defense to Plaintiff's Alleged Third Cause of Action.*

Defendant further says for a second defense, to said alleged third cause of action, that by the mutual consent and agreement of the several parties to said contract, the performance thereof, at or before the days named therein, was duly waived; that heretofore, to wit: at sundry times prior to the 15th day of December, 1893, the said defendant gave repeated orders to the said plaintiff for goods under the contract described in the third cause of action of the

plaintiff's petition; that the said plaintiff there and then and at all times failed and refused to fill said orders in manner and form as by said contract it had agreed to do, and on or about the 15th day of December, 1893, duly notified this defendant that it would make no further shipments under said contract, and there and then and thereby repudiated and rescinded said contract, to which said repudiation and rescission thereof, this defendant on or about the 19th day of December, 1893, duly assented, and thereafter and on or about the 2nd day of January, 1894, a full and final settlement was had between the said plaintiff and the said defendant of all differences between them growing out of said contract and the amount of said differences was duly paid by this defendant to the plaintiff and was duly accepted by said plaintiff.

Answer and First Defense to Plaintiff's Alleged Fourth Cause of Action.

For answer to said alleged fourth cause of action, this defendant says that the said alleged fourth cause of action does not state facts sufficient to constitute a cause of action, and prays all such benefit and advantage as if the defendant had demurred thereto, and for answer thereto admits that on the 8th day of May, 1893, it entered into a contract with the plaintiff and that the alleged copy thereof, filed with the plaintiff's amended petition, is a substantially correct copy thereof, and denies each and every allegation in the alleged fourth cause of action contained, not hereinbefore admitted to be true.

Answer and Second Defense to Plaintiff's Alleged Fourth Cause of Action.

Defendant further says for a second defense to said alleged fourth cause of action, that by the mutual consent and agreement of the several parties to said contract the performance thereof, at or before the days named therein, was duly waived, that heretofore, to wit, at sundry times prior to the 15th day of December, 1893, the
24 said defendant gave repeated orders to the said plaintiff for goods under the contract described in the fourth cause of action of the plaintiff's petition; that the said plaintiff there and then and at all times failed and refused to fill said orders in manner and form as by said contract it had agreed to do, and on or about the 15th day of December, 1893, duly notified this defendant that it would make no further shipments under said contract, and there and then and thereby repudiated and rescinded said contract, to which said repudiation and re-cission thereof, this defendant on or about the 19th day of December, 1893, duly assented, and thereafter and on or about the 2nd day of January, 1894, a full and final settlement was had between the said plaintiff and the said defendant of all differences between them growing out of said contract, and the amount of said differences was duly paid by this defendant to the plaintiff and was duly accepted by said plaintiff.

Wherefore, this defendant having fully answered, prays that it may go hence with its costs.

JAMES H. McINTOSH,
Attorney for Defendant.

STATE OF NEBRASKA, }
Douglas County, } ss:

James H. McIntosh, being first duly sworn, deposes and says, that he is the attorney for the defendant in the above-entitled action; that said defendant is a non-resident corporation; that he knows the contents of the foregoing answer and believes the facts therein stated are true.

JAMES H. McINTOSH.

Subscribed in my presence and sworn to before me this 5th day of June, 1894.

JOHN WILSON BATTIN,
[SEAL.] *Notary Public.*

Upon the back of said answer appear indorsements in the words and figures following, to wit: Doc. Q. No. 226. United States circuit court, district of Nebraska. The Western Manufacturing Company, plaintiff, *vs.* Kingman & Company, defendant. Answer. Filed Nov. 22, 1894. Elmer D. Frank, clerk. James H. McIntosh, attorney for defendant.

Thereupon afterwards, to wit: on the 27th day of November, 1894, reply to the answer of the defendant Kingman & Company was filed in said case, which said reply is in the words and figures following, to wit:

25 *Reply.*

In the Circuit Court of the United States, District of Nebraska.

THE WESTERN MANUFACTURING COMPANY, Pl'ff. }
vs.
KINGMAN & COMPANY, Def't. }

The plaintiff for its reply to the answer of the defendant Kingman & Company, denies each and every allegation in each and every of the several defenses in the said answer contained.

LAMB, ADAMS & SCOTT AND
MONTGOMERY, CHARLTON & HALL,
Att'ys for the Pl'ff.

STATE AND DISTRICT OF NEBRASKA, }
Lancaster County, } ss:

Walter J. Lamb, being first duly sworn on oath says he is attorney for the plaintiff corporation, and believes the facts stated in the foregoing reply to be true.

WALTER J. LAMB.

Subscribed in my presence and sworn to before me this 27th day of Nov., 1894.

FRANK H. DUNHAM,
[SEAL.] *Notary Public.*

Upon the back of said reply appear indorsements in the words and figures following, to wit: No. 226 Q. In the circuit court of the U. S., district of Nebraska. The Western Manufacturing Company, pl'ff, *vs.* Kingman and Company, def't. Reply. Filed Nov. 27, 1894. Elmer D. Frank, clerk. Lamb, Adams & Scott, Montgomery, Charlton & Hall, att'ys for the pl'ff.

* * * * * * *

Thereupon afterwards, to wit: at the May 1895 term of said court, and on said 31st day of May, 1895, the following proceedings were had and done in said case, as appears of record on folio 756 Journal "T" of said court, to wit:

Trial.

WESTERN MANUFACTURING COMPANY
vs.
KINGMAN & COMPANY. } 226 Q.

Now come the parties herein by their attorneys, and also comes the following-named jurors, to wit:

26

1. R. W. Gibson,
2. John Wallace,
3. A. T. Ayers,
4. A. W. Richardson,
5. Henry Frey,
6. John M. Matheney,
7. John W. McNabb,
8. John Barrett,
9. Maurice Sullivan,
10. W. W. Williams,
11. W. J. Mawhiney,
12. George E. Smith,

who were duly empanelled and sworn according to law, and thereupon after hearing the evidence in part, and the time having arrived for the adjournment of the court and the trial of this case not being finished, said jury was allowed to separate until the coming in of court tomorrow morning after being duly instructed as to their duties by the court.

Thereupon afterwards, to wit: at the May 1895 term of said court, and on the 3rd day of June, 1895, the following proceedings were had and done in said case, as appears of record on folio 762 Journal "T" of said court, to wit:

WESTERN MANUFACTURING COMPANY
vs.
KINGMAN & COMPANY. } 226 Q.

On motion of the plaintiff by Lamb, Adams & Scott its attorneys, it is ordered by the court that said plaintiff have leave to dismiss the first cause of action contained in the petition, without prejudice to the right of plaintiff to commence and prosecute a similar action in any court of competent jurisdiction, and that the same be and is hereby withdrawn from further consideration.

* * * * * * *

Thereupon afterwards, to wit: at the May 1895 term of said court, and on the said 3rd day of June, 1895, the following proceedings

were had and done in said case as appears of record on folio 762 Journal "T" of said court, to wit:

Cause Submitted to Jury.

WESTERN MANUFACTURING COMPANY
vs.
KINGMAN & COMPANY. } 226 Q.

On this day again come the parties hereto and also comes the jury heretofore empanelled and sworn herein, said jury after having heard the remaining evidence, argument of counsel and charge of the court, retired to its room for deliberation in charge of a bailiff sworn.

27 Thereupon afterwards, to wit: at the May 1895 term of said court, and on the 4th day of June, 1895, the following proceedings were had and done in said case as appears of record on folio 765 Journal "T" of said court, to wit:

WESTERN MANUFACTURING COMPANY
vs.
KINGMAN & COMPANY. } 226 Q.

On this day again come the parties hereto, by their attorneys, and also comes the jury heretofore empanelled and sworn herein and presents to the court its verdict in writing, which is (—) the words and figures following, to wit:

"In the Circuit Court of the United States for the District of Nebraska," May Term, A. D. 1895.

THE WESTERN MANUFACTURING COMPANY, Plaintiff,
vs.
KINGMAN & Co., Defendants. } 226 Q.

We, the jury in this cause, being duly empanelled and sworn, find and say: We find the issues joined in favor of the plaintiff and we assess the plaintiff's damages at the sum $1,996.66, one thousand nine hundred and ninety-six and $\frac{66}{100}$ dollars.

R. W. GIBSON, *Foreman.*	JOHN W. McNABB.
JOHN WALLACE.	JOHN BARRETT.
A. T. AYERS.	MAURICE SULLIVAN.
A. W. RICHARDSON.	W. W. WILLIAMS.
HENRY FRY.	W. J. MAWHINEY.
JOHN M. MATHENEY.	GEO. E. SMITH.

Thereupon afterwards, to wit, at the May, 1895, term of said court and on the said 4th day of June, 1895, the following proceedings were had and done in said case, as appears of record on folio 769 Journal "T" of said court to wit:

Judgment.

WESTERN MANUFACTURING COMPANY
vs.
KINGMAN & COMPANY. } 226 Q.

The jury in this action having on this day rendered a verdict in favor of the plaintiff and against the defendant herein for the sum of $1,996.66, on motion of said plaintiff by Lamb, Adams & Scott, its attorneys, it is considered, ordered and adjudged by the court that said plaintiff is entitled to judgment on said verdict, and that said plaintiff, The Western Manufacturing Company, have and
28 recover of and from Kingman & Company the sum of nineteen hundred ninety-six dollars and sixty-six cents ($1,996.66), together with $— costs herein expended and that execution issue therefor.

Thereupon, afterwards, to wit, on the 6th day of June, 1895, motion for new trial was filed in said case; which said motion for new trial is in the words and figures following, to wit:

In the Circuit Court of the United States for the District Nebraska.

Motion for a New Trial.

WESTERN MANUFACTURING COMPANY, Plaintiff,
vs.
KINGMAN & COMPANY, Defendant.

Now comes the defendant and moves the court to vacate and set aside the judgment herein, and for a new trial of this cause for the following reasons:

1. The damages are excessive, appearing to have been given under the influence of passion or prejudice.
2. The verdict and judgment are not sustained by sufficient evidence.
3. The verdict and judgment are contrary to law.
4. The errors of law (according) at the trial duly accepted to.
5. The verdict and judgment are not sustained by the evidence.
6. The verdict is contrary to the 11th paragraph of instructions given at the defendant's request.
7. The verdict is contrary to the 13th paragraph of instructions given at the defendant's request.
8. The verdict is contrary to the 14th paragraph of instructions given at the defendant's request.
9. The verdict is contrary to the 15th paragraph of instructions given at the defendant's request,
10. The verdict is contrary to the 16th paragraph of instructions given at the defendant's request.
11. The verdict is contrary to the 18th paragraph of instructions given at the defendant's request.

12. The verdict is contrary to the 20th paragraph of instructions given at the defendant's request.

29 13. The verdict is contrary to the 21st paragraph of instructions given at the defendant's request.

14. The verdict is contrary to the 24th paragraph of instructions given at the defendant's request.

15. The court erred in refusing to give the 1st paragraph of instructions requested by the defendant, which was as follows:

"The jury are instructed that under the pleadings and evidence in this case the plaintiff cannot recover, and you are therefore directed to return a verdict for the defendant."

16. The court erred in refusing to give the 3rd paragraph of instructions requested by the defendant, which was as follows:

"3. The jury are instructed to return a verdict for the defendant on the plaintiff's alleged second cause of action."

17. The court erred in refusing to give the 4th paragraph of instructions requested by the defendant, which was as follows:

"4. The jury are requested to return a verdict for the defendant on the plaintiff's alleged third cause of action."

18. The court erred in refusing to give the 5th paragraph of instructions requested by the defendant, which was as follows:

"5. The jury are instructed to return a verdict for the defendant on the plaintiff's alleged fourth cause of action."

19. The court erred in refusing to give the 8th paragraph of instructions requested by the defendant, which was as follows:

"8. You are further instructed that the contract which forms the subject-matter of the plaintiff's second, third, and fourth causes of action is what is called in law 'entire;' and the plaintiff, if it is damaged by a breach thereof, cannot split said damage up into three causes of action, but can have but one, and one cause of action only. You are instructed, therefore, that the plaintiff having undertaken to split said alleged breach of contract into three causes of action cannot recover upon any of them, and your verdict should be for the defendant."

20. The court erred in refusing to give the 9th paragraph of instructions requested by the defendant, which was as follows:

30 "9. You are further instructed that the contract which forms the subject-matter of the plaintiff's second, third, and fourth causes of action is entire, for a breach of which there could be but one cause of action. You are therefore instructed at any and all events to return a verdict for the defendant on two of the three alleged causes of action, called second, third, and forth causes of action in the plaintiff's amended petition."

21. The court erred in refusing to give the 10th paragraph of instructions requested by the defendant, which was as follows:

"10. The jury are further instructed that as to the mowers referred to in the plaintiff's alleged second cause of action, the plaintiff avers that it tendered said mowers to the defendant. The plaintiff is bound by this averment and therefore cannot sue the defendant for damages for not taking said mowers, but having alleged that it tendered the same, said mowers, in so far as the plain-

tiff was concerned, thereby became the property of the defendant, and your verdict should be for the defendant in so far as it relates to the plaintiff's alleged second cause of action."

22. The court erred in refusing to give the 12th paragraph of instructions requested by the defendant, which was as follows:

"12. You are further instructed that if you find from the evidence that each of the parties to the contract referred to in the plaintiff's second, third, and fourth causes of action, indicated in an oral conversation between the agents of the plaintiff and the defendant at Peoria, in November, 1893, a willingness to perform said contract, then neither party thereto could put the other in default of a performance thereof without first making upon the other a demand of performance, giving a reasonable time within which to perform, and giving notice that a failure to comply with said demand within a reasonable time after it was made would be deemed a forfeiture of said contract, and if you find from the evidence that the plaintiff refused to furnish goods under said contract without making such demand and giving such notice, then the plaintiff cannot recover for a breach thereof, and your verdict as to the plaintiff's second, third, and fourth causes of action should be for the defendant."

23. The court erred in refusing to give the 19th paragraph of instructions requested by the defendant, which was as follows:

31 "19. If you find from the evidence that a fire occurred on or about the 26th day of October, 1893, in the shops of the plaintiff which incapacitated it from furnishing to the defendant all of the different kinds of goods described in the contract referred to in the second, third and fourth causes of action in manner and form as in said contract agreed, then your verdict as to said second, third and fourth causes of action should be for the defendant: for, as I have before told you, the plaintiff cannot recover without proving first to your satisfaction that it had the ability on its part to perform said contract, and if you find from the evidence that it had no such ability, then your verdict should be for the defendant, and it makes no difference that the plaintiff's inability to perform the contract was due to the destruction of its manufacturing plant by fire."

24. The court erred in refusing to give the 22nd paragraph of the instructions requested by the defendant, which was as follows:

"22. You are further instructed that if you find from the evidence that the defendant ordered from the plaintiff a part of the goods agreed in the written contract between them to be ordered, and in pursuance of such orders the plaintiff delivered to the defendant a part of the goods described therein, and that on or about the second day of January, 1894, a settlement was duly made between the plaintiff and the defendant under and in pursuance of the terms of said contract, by which the defendant paid to the plaintiff the balance due it under said contract for the goods so delivered by the plaintiff to the defendant, and unsettled for, then your verdict should be for the defendant, as to the plaintiff's second, third and fourth causes of action."

25. The court erred in refusing to give the 23rd paragraph of instructions requested by the defendant, which was as follows:

"23. The jury are further instructed that if you find from the evidence that after the acts and conversations which the plaintiff claims constituted a breach of said contract on the defendant's part, the plaintiff and the defendant made a settlement with each other, according to the terms of said contract, and under and in pursuance of it, for the goods that had been delivered to the defendant under said contract, such settlement would constitute a waiver of any damages which the plaintiff might have sustained by reason of any breach of said contract prior to said settlement; for the plaintiff could not treat said contract as existing for the pur-
32 pose of settling with the defendant for the balance due the plaintiff, but broken for the purpose of recovering damages from the defendant, and in that event your verdict as to the plaintiff's second, third and fourth causes of action should be for the defendant."

26. The court erred in refusing to give the 25th paragraph of instructions requested by the defendant, which was as follows:

"25. The jury are further instructed that even if you should find from the evidence in this case considered by you in the light of the instructions of the court that the plaintiff was entitled to recover on its second, third and fourth causes of action or any one or more of them, still the plaintiff cannot recover from the defendant more than nominal damages; for where there is a breach of a contract for the failure to order articles agreed to be ordered at a specific price, and which are to be manufactured, the measure of damages for a breach of such a contract is the profits that the plaintiff would have made by the manufacture and sale of such articles according to the terms of the contract, after making a reasonable allowance for less time employed and for release from the care, trouble, risk, and responsibility attending a full execution of the contract. There is nothing in the pleadings in this case nor in the evidence from which you could find what the plaintiff's damages, if any, were, when measured by the rule given you in this instruction. Hence, even although you should find for the plaintiff on said second, third and fourth causes of action or any one or more of them, you can only award it nominal damages, by which is meant some small sum such as five cents."

27. The court erred in refusing to give the 26th paragraph of instructions requested by the defendant, which was as follows:

"26. You are further instructed that there is no evidence given by the plaintiff of the market value of the goods described in the contract of May 8th, 1893, between the parties to this suit at Peoria, St. Louis, Kansas City, Des Moines, or Sioux City. The goods described in the contract between these parties were to be delivered to the defendant at any one of the above-named places, or at Omaha. The plaintiff therefore having failed to furnish any evidence of the market value of said goods at the above-named places has failed to furnish evidence by which you can reach a verdict for any sub-

stantial sum in its favor, and therefore you are instructed
33 that in no event can you return a verdict for the plaintiff for more than a mere nominal sum, such as five cents."

28. The court erred in its instructions to the jury on the court's own motion as to the measure of damages.

29. The court erred in instructing the jury that the "measure of damages would be, if the plaintiff is entitled to recover at all, *would be* the difference between what the defendant agreed to pay for the machines when ordered and the general market price of the machines when the plaintiff might have them on hand at the time they ought to have been delivered and at the time it is claimed the defendant refused to receive the same."

30. The court erred in instructing the jury that if they found the plaintiff was entitled to recover any sum whatever for its damages sustained, they should ascertain the contract price and then determine from the testimony as well as they could what was the real market value of the machines in the country at the times and places when and where the same were to be delivered by the plaintiff on the orders of the defendant that were to be made by it as provided in the contract.

31. The verdict is contrary to that part of the court's instructions relating to the measure of damages.

Wherefore the defendant prays that the judgment and verdict herein may be vacated and set aside, and that the defendant may have a new trial of this action.

JAMES H. McINTOSH,
Attorney for Defendant.

Upon the back of said motion for a new trial appear endorsements in the words and figures following, to wit: Q. 226. Circuit court of the United States, district of Nebraska. Western Manufacturing Company, plaintiff, *vs.* Kingman & Company, defendant. Motion for a new trial. Filed Jun. 6, 1895. Elmer D. Frank, clerk. James H. McIntosh, attorney for defendant.

Thereupon afterwards, to wit, at the November, 1895, term of said court and on the 11th day of December, 1895, the following
34 proceedings were had and done in said case, as appears of record on folio 254, Journal "U" of said court, to wit:

THE WESTERN MANUFACTURING COMPANY
vs.
KINGMAN & COMPANY. } 226 Q.

This cause having been heard on the motion of the defendant to set aside the judgment and the verdict and for a new trial herein, was argued and submitted to the court by the attorneys for the respective parties; whereupon, after careful consideration thereof and being fully advised in the premises, it is now on this day considered, ordered, and adjudged by the court that said motion be, and the same is hereby, overruled, and that the judgment heretofore entered herein be and remain absolute.

Thereupon afterwards, to wit, at the November, 1895, term of said court and on the 12th day of December, 1895, the following proceedings were had and done in said case, as appears of record on folio 258, Journal "U" of said court, to wit:

THE WESTERN MANUFACTURING COMPANY
vs.
KINGMAN & COMPANY. } 226 Q.

On motion of the defendant, by J. H. McIntosh, its attorney, it was ordered by the court that said defendant be allowed thirty days from this date in which to prepare and present its bill of exceptions herein.

* * * * * * *

Thereupon afterwards, to wit, on the 11th day of January, 1896, a bill of exceptions *were* filed in said case; which said bill of exceptions is in the words and figures following, to wit:

Presented for signature on the 9 January, 1896.
ELMER S. DUNDY, *Judge.*

Bill of Exceptions.

In the Circuit Court of the United States for the District of Nebraska.

WESTERN MANUFACTURING COMPANY, Plaintiff,
vs.
KINGMAN & COMPANY, Defendants.

Be it remembered that at the May, 1895, term of this court, on the 31st day of May of said term, the issues in this cause
35 came on for trial before the Honorable Elmer S. Dundy, district judge, and a jury duly empaneled and sworn—Lamb Adams & Scott appearing for the plaintiff and James H. McIntosh for the defendant—and thereupon the jury being duly empaneled and sworn, and the parties to said cause, by their respective attorneys, having stated the case to the jury, the said plaintiff, to maintain the issues on its part, called as a witness M. D. WELCH, who testified as follows:

Q. Where do you reside?
A. Lincoln, Nebraska.
Q. You have lived there how long?
A. Since 1881.
Q. What has been your business since 1881?
A. I was engaged in the handling of farm wagons and buggies and etc. up until 1888.
Q. State what experience you have had with agricultural implements beginning at the beginning, and tell the jury what you know about it?
A. I have been engaged in that ever since 1860.
Q. In what way?

A. I have been engaged as a dealer selling to farmers; I have been engaged as a traveling man for implement houses and manufacturers (and) of threshing machines for six years; with another concern for eight or ten years and I have been manufacturing since 1888.

Q. Now you may state whether or not you are the manager of the plaintiff corporation, The Western Manufacturing Company?

A. Yes, sir, I am.

Q. How long have you been connected with that in that capacity?

A. Since 1888 I have been an officer and manager of the business.

Q. State the character of this (co*m*panies) business in this line of agricultural implements?

A. They manufactured when the company was incorporated—they succeeded another company and we manufactured corn-shellers, hay-rakes, corn planters, (stock) cutters, shovel boards—(not) the shovel boards were taken in afterwards—and moving machines.

Q. What have you manufactured since 1888?

A. Manufactured all this for a time and added to it the shovel boards or end gates for wagons.

Q. Now you may state in 1893, prior to May 1893, where and what territory the Western Mfg. Co., had its trade established?

36 Mr. McIntosh: The defendant objects as calling for the conclusion of the witness.

Overruled. Exception.

Q. State the facts.

A. We had trade in Illinois, Missouri, Kansas, Indian and Oklahoma Territories, Iowa, Nebraska and Dakota.

Q. About what was the character and extent of that trade?

Mr. McIntosh: The defendant objects until it is proven that we made any contract with reference to that trade, and further objects to the introduction of any further evidence in this case, with reference to the plaintiff's second third and fourth causes of action, on the ground that said counts do not state facts sufficient to constitute a cause of action.

Overruled. Exception.

Thereupon the plaintiff offered in evidence the contract which forms the basis of the plaintiff's claim, as plaintiff's Exhibit "I", the parties agreeing that the copy is genuine, but the defendant objected to the introduction thereof on the ground that the same was incompetent under the pleadings, and that the contract thereby made is an entire contract, which (o*n*jection) was overruled, defendant excepted, and said contract was then read to the jury, in words and figures following, to wit:

Memorandum agreement, made and entered into this 8th day of May, 1893, between The Western Mfg. Co., of Lincoln, Nebraska, party of the first part, and Kingman & Company, of Peoria, Illinois, party of the second part, witnesseth:

The Western Manufacturing Co. hereby grant to Kingman and

Company the exclusive sale for one year from the date hereof the following articles manufactured by them at Lincoln, Nebr., to wit:

The Kingman and Weir Standard mowers.

Defiance hand corn-shellers.

Climax end gates.

The territory covered by said exclusive sale comprises the States of Illinois, Missouri, Kansas, Nebraska, Iowa and South Dakota, Indian and Oklahoma Territories.

In consideration of the above territory being set apart for the exclusive use of said Kingman & Co. the said Kingman & Co. hereby agree to order of the Western Mfg. Co. and pay for at the prices and terms hereinafter named, and between the dates stated, the following number of articles:

37 160 mowers at the folowing prices:

4 ft. 6	$25 00
5 ft	26 00

The same to be ordered between this date and October 1st, 1893.

1,800 Defiance corn-shellers, at following prices:

With fan and feed-table	$4 35
Without fan, with feed-table	4 00

The same to be ordered during the year.

1,200 Climax end gates, to be ordered between Aug. 1st and Dec. 1st, 1893, at $1.25 each.

The above prices are f. o. b. Peoria, St. Louis, Kansas City, Des Moines, Omaha or Sioux City.

Terms are as follows:

On mowers, ½ payable January 1st, 1894; balance October 1st, 1894, with interest at 6 per cent. from Jan. 1st, 1894. Shellers and end gates 4 mos. from date of shipment. All invoices to be settled for by note on receipt of goods or 3 off for cash in 10 days on shellers and end gates. Any more goods that the party of the second part may want during the continuance of this contract to be furnished at the same prices and terms above noted.

The Western Mfg. Co. warrant all the articles herein named to be well made and finished, and any defects in material or workmanship will be made good without cost to said Kingman & Co.

Made in 6 copies this 8th day of May, 1893.

WESTERN MANUFACTURING COMPANY,
By M. D. WELCH, *Sec'y & Tr.*
KINGMAN & COMPANY,
By M. KINGMAN, *Pt.*

Thereupon the defendant objected to the introduction of any evidence as to either the second, third, or fourth counts, because the contract just read in evidence is an entire contract. Objection overruled. Exception.

Q. You may state what you did under this written contract after

you made it, with regard to manufacturing and preparing for delivery the several articles described therein.

A. After making the contract I went to Arkansas, and I bought lumber to make four thousand end gates. I went to work and got the material together, what was necessary, to make four thousand end gates. We had the material for a large number of shellers on hand, the wood part of it, and what we did not have to make—I think it was three thousand shellers we set out to make—I bought the lumber to complete these shellers, and bought the iron and steel. I gave orders to the foundry to prepare the castings to make the shellers. In regard to the mowers I had some castings on hand of a certain kind. Over the gear cover there was one and the name of the mower was the "Capital" and it was cast in this metal and on the (took) box cover the words "Western Manufacturing Company, Lincoln," was cast on there and the contract called for the "Wier" mowers and the "Kingman" mowers and I threw away these castings and prepared others with the name "Kingman" & "Wier" and finished them up; they were in an incomplete state.

Q. Now you may state how many mowers you had on hand there ready to deliver to Kingman?

A. I had on hand more than enough to supply the number named in his order.

Q. And how many end gates did you manufacture?

A. I manufactured for him 1,600 I think it was, 12 or 16 hundred, and had them completed and I had the material on hand for more. We didn't manufacture everything all at once; we manufactured them along as we thought the demand would be for them.

Q. How many did you mark with his name on?

A. Two car-loads; there must have been 1,000 or 1,500; I don't just remember now.

Q. And where were those put that were made?

A. In the building that was burned up.

Q. And were those burned up?

A. Those were burned up.

Q. And how many others did you have or material ready that you had prepared under this contract to make up?

Mr. McIntosh: The defendant objects as immaterial.

Overruled. Exception.

A. I could have filled an order for 1,200 end gates in a very few days. I had the iron all ready and all I had to do was to nail them together, the wood part.

Q. And shellers?

A. I had some on hand that were finished and some that were partly finished.

Q. Describe exactly.

A. I could fill orders for shellers in 15 or 20 days, as I wrote them.

Q. How many shellers were burned up?

A. There were no shellers—complete shellers burned up, except

160 that were ready for shipment, but there were others that
39 could be ready for shipment in a short time. I didn't keep two or three hundred shellers complete on hand at any one time, but they were primed, and stored away, and when an order came, it would take about a week or ten days to prime them and stencil them and ship them.

Q. Any mowers burned up?

A. Some parts of mowers burned up; burned up the poles, all the poles, I think, of the mowers, and burned up some machines; I don't know just how many.

Q. State how many mowers, if any, the defendant ordered between the 8th of May, 1893, and the 1st of October, 1893, during the time in which he was to order them by the contract?

A. I think he ordered 54.

Q. And others?

A. No more than that.

Q. State whether or not on the first of October, 1894, you had on hand ready for delivery to Kingman, had he ordered them, enough to fill the amount of that contract?

A. Yes, sir, I did.

Q. Now you may state how many end gates, if any, Kingman ever ordered?

A. He never ordered any.

Q. How many shellers were ever ordered before November 22nd, 1893?

A. They had ordered 421 shellers up to that time which we had shipped according to their statement. I was never able to verify this for the reason my invoice book was burned. This was their account, and we had their order for 160 more to ship to Des Moines, which would make 581 they had ordered.

Q. Up to November 22d, 1893?

A. Yes, sir, leaving 1,219 due on the order.

Q. You may state whether or not in October, 1893, you visited Kingman and Company?

A. Yes, sir, I made an appointment to meet Kingman in Chicago.

Q. And I will ask you whether or not before that time or May, 1893, and that time, that you had visited Peoria to see Mr. Kingman about this matter?

A. Been there twice.

Q. State what took place at these meetings with regard to your soliciting orders, or asking for orders for the goods? Give the dates of the meetings?

A. I was in Peoria on the 18th of July, 1893, and called on him and urged him——

Q. What did you say to him about these orders?

A. I asked him for orders for machines.

40 Q. Do you remember what he said?

A. He said he would look it up, and see where they needed any at his branch houses, and send for them.

Q. When did you next see him?

A. Then I met him in Chicago on the 4th of October, I think, and had a talk with him there.

Q. State what took place at that time?

A. About the same conversation we had before. I urged him to send in orders for goods under the contract.

Q. About what date was that?

A. I think that was along the first of October. I met him there casually, but I met him again on the 22nd of October by appointment.

Q. What took place at that time?

A. I told him that the contract had expired, the time had elapsed in which he agreed to take these mowers and that he must make some settlement with me about them. Either he might put them in store there, and he settle for them or do something; that I needed the money or his papers or notes as I was financially embarrassed, and he said he didn't propose to store them in Lincoln; he would store them in his own warehouses, and he would go home and write to his branch houses, and get orders and take the 108 mowers or whatever it was that was due under the contract.

Q. Did he say how soon he would write to the different houses, get these orders, and forward the orders to you?

A. I would hear from him promptly, he said.

Q. Who was present at that conversation?

A. No one.

Q. Where did that take place?

A. The Grand Pacific hotel.

Q. From there where did you go?

A. Came right back home.

Q. Did you after that write him a letter?

A. Yes, sir.

Mr. LAMB: The plaintiff offers in evidence a letter dated November 9th, 1893, and marked Exhibit "2," which was received and read in evidence as follows:

LINCOLN, NEBR., *Nov. 9th*, 1893.

Kingman & Co., Peoria, Illinois.

GENTLEMEN: Your Mr. Kingman, whom the writer met in Chicago on the 26th inst., stated that we would hear from you in a short time relative to the disposition of the balance of mowers due on your contract. We hope you can give us shipping directions at once.

41 On account of the fire we had we are very much cramped for room, and need the room these mowers occupy for a paint shop. Please favor us by return mail.

We have the following Defiance shellers on hand, partly completed, 394 no fan, 397 with fan, and we will begin work on these next week, and complete them as rapidly as possible, and would be pleased to have you order now for 2 or 3 cars, so we can ship them out as fast as finished.

Yours truly, WESTERN MANUFACTURING CO.,
M. D. WELCH, *Sec'y & Treas.*

By the WITNESS: There is a mistake in that letter. I said I met met him in Chicago the 26th, but it was the 22nd, as I was home on the 26th. That was the date of the fire and I had that in my mind when I wrote the letter.

Plaintiff's counsel offers in evidence the following letter, answer to Exhibit "2" admitted, marked Plaintiff's Exhibit "3" and read as follows:

Nov. 18, 1893.

Western Mfg. Co., Lincoln, Nebraska.

GENTLEMEN: Yours of the 9th, requesting shipping instruction for mowers is received and noted. We have been considering the same, as to what we could do, as to taking these mowers, and write to say that it is out of the question for us to do so, and do not see any way but you will have to store them.

We note as to shellers, and were obliged to order a car from other parties, to fill the place of car ordered to Des Moines. We have now written Omaha, asking if they are about ready to place an order for another car, and giving them the number of shellers you have on hand. We expect an order in a few days, and will forward same to you. The writer was at Omaha last week, and while there talked over matters with Mr. Carson. He says there is but little demand for shellers in Nebr., that the trade is very light, but that he will need some shellers soon. We will write him again concerning your stock, and will try and draw from you soon.

Yours truly,

KINGMAN & COMPANY,
By M. KINGMAN, *Pt.*

42 Q. You may state how soon after you received that letter you visited Peoria, if at all.

A. I think the next day after the receipt of that letter I went to Peoria. I arrived at Peoria the morning of the 21st.

Q. What month?

A. November.

Q. Of the same November, 1893, that letter is dated?

A. Yes, sir.

Q. State in detail all that occurred there between you and Kingman.

(Q.) I was unable to see him the first day, and I stopped over till the 22nd.

Q. Where did you meet him then?

A. In his private office—he called me in there. I went in, and sat down opposite to his desk, and he wanted to know what I wanted. I told him I wanted him to take these mowers that he had agreed to take, he had agreed to send me orders for, when I met him in Chicago, a few weeks before. He said that he didn't see how he could take them; that it had been a poor season to sell mowers, and he thought the best thing I could do would be to carry them over. I told him I was willing to carry them if he would settle for them; that I depended realizing on those mowers; that I needed the money. I had warehouses, that the company used the

(*the*) public warehouses and had taken out a license. I would put the mowers in storage and give him a warehouse receipt, and he could settle for them according to the terms of the contract, and I could use his paper. He said that he wouldn't take any mowers—wouldn't take any mowers at all. He said "I wrote you to that effect." "Well," I says, "what is this contract made for; this contract says—you agree here in this contract to take these mowers." "Well," he says, "if you insist upon my taking those mowers, I won't buy any more goods of you." I told him that didn't amount to anything. According to this theory, I couldn't tell whether I had sold him any goods or not. I had made a contract and sold him goods, and he refused to take them; and the contract made about shellers and end gates? He says, "Your end gates were all burned up." "Well," says I, "there were a lot of them burned up that were finished, but we have the material to make as many more, and I can fill your order for end gates in ten days or two weeks."

He said he didn't want any end gates, and he wouldn't take any mowers. "Now," I said, "here is a great big burden for somebody to carry, and I am not able to carry all these goods, and you ought to meet me half way, and make some arrangement whereby I would be relieved from carrying these goods.

43 I am willing to help you out, if you are willing to help me out." He said, "I will not take any more goods of you at all." He said, "You can sue me, *you can sue me* if you want to," and he pounded on the desk, and seemed to be very much excited, and got up, and went out of the office. Then he came back, after fifteen or twenty minutes, and said, "Welch, I don't want these goods," but he said, "I will take one hundred mowers, if you will call it square—the whole contract—and make it void against everything else." "Well," I said, "what about the shellers—there is a whole lot of shellers and end gates," and he said, "You haven't got any end gates." I said "We won't count end gates, and if you will settle for the mowers and shellers, we will not say anything about the end gates; we have the material, and I can make them up, and sell them next year." He said, "I don't want the shellers;" that his warehouses were full of shellers. He said he wanted some in Des Moines but he didn't know anywhere else. He said, "We have all the shellers we need; there is a light crop of corn, and we don't need them. I won't take any shellers at all, but will take one hundred mowers." I said, "I won't settle on that basis;" and I said, "I will settle if you will take the mowers and shellers according to the terms, and settle for them according to the terms of the contract—that is, settle for the mowers now, and order the corn-shellers as you want them." He says, "How many corn-shellers have you got?" I says, "Enough to fill your order—I can supply them as fast as you want them. The contract runs till next spring, and between now and then we will have enough ready." I had something like 250, I think it was, having on hand enough to complete his order, and then he says, "If you won't except my proposition to take one hundred mowers, and cancel the contract I will with-

draw it, and I won't take anything, and you can go on and sue me." I told him I was very much surprised at the position he took in the matter, and I told him I had known him a good many years, and I had always supposed he had done as he agreed. I had made a contract in good faith with him, and turned over all the territory where we had any trade at all, and we had actually and practically put ourselves in the (*w*hole)—we was out of the business—was unknown. There was no year but what I had sold from two to four thousand end gates in Nebraska and Iowa, and he had not taken one. I said, "This is a bad place you have put me in, or the company in, and I didn't like it;" and he turned to Mr. Schimpff, his secretary, and said, "Settle with Welch for what goods we have had under the contract," and I told him I didn't want to make any settlement with him. He wanted to know if I had a statement of the account, and I says, "Yes." He wanted to know if I would
44 leave it with him, and I told him "No, I didn't want to do any more business with him; he had repudiated the contract, and everything seemed to be torn up, and I wanted to get home, and talk with my associates and consult my attorney in the matter in view of the turn it had taken, and I didn't feel at liberty to do any more business with him, and we separated, and I went home.

Q. When did you next see him?

A. I saw him the next morning.

Q. State the circumstances and where.

A. I took a sleeper that evening there at the depot for Chicago, and when I was in the toilet-room in the morning, just as the train was in the depot, he passed through the car, and he touched me with his elbow or something, and I (*mak*e) some joking remark or he did about being a bad man, or something like that—or two bad men riding on the same train, but nothing in regard to business, but just passed the hour.

Q. Have you ever seen him from that time to this, with regard to this business?

A. Yes, sir.

Q. Where?

A. In Omaha.

Q. Was anything said at that time, excepting in the way of attempting a compromise?

A. Nothing.

Q. Any other time that you recollect?

A. No, sir, I don't recollect any. I might have met him.

Q. Have they ever ordered or taken those 108 mowers?

A. No, sir, they never have.

Q. Have they ever ordered or taken any of those end gates?

A. No, sir.

Q. Now you may state definitely what was the condition of the market, with regard to those agricultural implements in November, 1893, at the time this contract occurred?

Mr. McIntosh: Objected to as immaterial, and not responsive to the issues in this case.
Overruled. Exception.

A. With regard to each one of them?
Q. Yes, sir, state what you know about it first.

Mr. McIntosh: Same objection.
Overruled. Exception.

A. In regard to corn-shellers—as I understand he terminated the contract——

Mr. McIntosh: Defendant objects to what he understood.
Sustained. Exception.

45 Q. Fix the date. Tell what you know with regard to the market for those several things prior to November 22nd, 1893; say for the year after that date?

Mr. McIntosh: Objected to as immaterial and not responsive to the issues in this case.
Overruled. Exception.

A. I made an effort to sell some corn-shellers and I couldn't do it.

Mr. McIntosh: I move that the answer be stricken out as not responsive.
Overruled. Exception.

Q. What places did you visit?

Mr. McIntosh: Defendant objects as immaterial.
Overruled. Exception.

A. I visited Omaha, Council Bluffs, Kansas City, and St. Louis to sell corn-shellers, and end gates, and I couldn't sell any or get an offer. Every man I saw was full and overrunning with shellers. I offered shellers for $3.00 apiece and couldn't sell them.

Mr. McIntosh: The defendant moves the court to strike out the last answer as not responsive to the question, and also as irrelevant and immaterial under the issues in this case.
Overruled. Exception.

Q. Now you may state what was the market value of these mowers on or about the 22nd day of November, 1893, that 108, if you know?

Mr. McIntosh: (Defendants) objects as immaterial and too indefinite.
Overruled. Exception.

A. It would be hard to determine for several reasons.
Q. State what, from your knowledge of the market value, what was the fair market value or saleable value of them in November, 1893, and during that following year?

Mr. McIntosh: The defendant objects as immaterial and not responsive to the issues.
Overruled. Exception.

A. My opinion is the mowers couldn't be sold in the market for anything.

Q. What would they be fairly worth in the market to sell?

Mr. McIntosh: Same objection.

Overruled. Exception.

46 A. That is a difficult question to answer. There is no market for mowers at that time of the year.

Q. I will ask you whether or not—how long have you been engaged in the sale of mowers?

A. Since 1888.

Q. Did you during the year 1893, know the value of mowers on that market?

A. In their season I did.

Q. Didn't you know also during the whole year what they were worth?

A. Yes, sir.

Q. You may state, in your opinion, what these were worth?

Mr. McIntosh: Objected to as immaterial and not responsive to the issues.

Overruled. (*Objection.*)

A. My opinion is they wouldn't be worth to exceed $12.50 apiece.

Q. What were corn-shellers worth?

Mr. McIntosh: Objected to as immaterial and not responsive to the issues.

Overruled. Exception.

A. From $2.00 to $2.50.

Q. And end gates?

Mr. McIntosh: Objected to as immaterial and not responsive to the issues.

Overruled. Exception.

A. From 75c. to 80c.

Q. I will ask you during what time of the year according to the usual custom of trade are orders placed with manufacturers by dealers for mowers?

Mr. McIntosh: Objected to as immaterial and not responsive to the issues.

Overruled. Exception.

A. Along in the winter prior to the time that mowers are used.

Q. Fix the date, please?

— McIntosh: Objected to as immaterial and not responsive to the issues.

Overruled. Exception.

A. Jobbers or dealers generally order their stock of mowers in January, December, February and March for the ensuing year.

47 Q. And end gates?

Mr. McIntosh: Objected to as immaterial and not responsive to the issues.

Overruled. Exception.

A. End gates are ordered in the summer.

Q. And shellers?

Mr. McIntosh: Objected to as immaterial and not responsive to the issues.

Overruled. Exception.

A. Shellers are contracted for in the spring, from January to June.

Q. State about what deterioration, if any, there is on this class of machines, or these several classes of machinery, where held or carried over?

Mr. McIntosh: Objected to as immaterial and not responsive to the issues.

Overruled. Exception.

A. About 10 per cent. or more; all owing to how well they are stored and taken care of.

Q. And about what is the storage on them worth per annum? What per cent.?

Mr. McIntosh: Objected to as immaterial and not responsive to the issues.

Overruled. Exception.

A. There is a regular schedule for storage of such goods by parties who have warehouses. I think 25c. on a corn-sheller, $1 on a mower, and 10c. to 15c. on an end gate.

Cross-examined.

By Mr. McIntosh:

Q. You are a stockholder of the plaintiff?

A. Yes, sir.

Q. What is the capital stock of the plaintiff?

Mr. McIntosh: I wish to show the interest of the witness in the event of the suit.

Mr. Lamb: The plaintiff objects as immaterial and as improper cross-examination.

Sustained. Exception.

Q. You had been doing business with the defendant for a long time prior to May, 1893?

A. I think three or four years.

48 Q. And had been acquainted with the officers of the defendant for a long time prior to that?

A. I had known Mr. Kingman since 1866.

Q. They bought some mowers during the summer of 1893?

A. Yes, sir.

Q. These mowers were the ordinary mowers for cutting grass to be cured into hay, were they not?

A. Yes, sir.

Q. And they were mowers designed to be pulled by two horses, and not by one or four?

A. They were designed for two horses.

Q. They were mowers of the ordinary width of draft of either 4½ or five ft. cut, as the purchaser chose?

A. Yes, sir.

Q. And they were capable of doing as good work as other goods of a similar kind, were they?

Mr. LAMB: Plaintiff objects as not proper cross-examination.

Sustained. Exception.

Q. These mowers had been in the market for how long?

A. You mean this pattern of mower?

Q. Yes, sir; this style of mower.

A. For a good many years.

Q. And they had been sold generally as mowers are sold over the territory you canvassed?

A. Yes, sir.

Q. And were during these years?

A. Yes, sir.

Q. And during these years were bought by the trade generally?

A. Yes, sir.

Q. And used by farmers?

A. Yes, sir.

Q. Just as any other mowers were?

A. Yes, sir.

Q. In other words, these were ordinary mowing machines, such as the Buckeye or Osborn or Wood, or any other of these mowing machines?

A. They were not like them.

Q. But they were similar to them?

A. They were mowers that filled the same purpose.

Q. Is that right?

A. They cut grass.

Q. Do you reiterate the statement of your attorneys—they were mowers perfect in all respects and of the highest grade?

49 Mr. LAMB: Objected to by the plaintiff as not proper cross-examination.

Sustained. Exception.

Mr. MCINTOSH: The defendant offers to show by the question——

By the COURT: Do not state what you offer to show.

Mr. MCINTOSH: I understand, your honor, that in order to make my record I must make my offer of proof.

By the COURT: That is not the facts in this court.

Defendant excepts.

Q. Now, about these corn-shellers—they were ordinary hand corn-shellers?

A. Yes, sir.

Q. That is, where the sheller is turned by a crank and the ears fed in one at a time?

A. Yes, sir.

Q. Such as hand corn-shellers are generally?

A. Yes, sir.

Q. And were equally as good as hand corn-sheliers were generally?

Mr. LAMB: Plaintiff objects as not proper cross-examination and immaterial under the issues joined.

Sustained. Exception.

Mr. MCINTOSH: The defendant offers to show by the question——

By the COURT: Do not state what you offer to show.

Mr. MCINTOSH: Exception.

Q. What do you mean by a "fan" on corn-shellers?

A. Some corn-shellers are made with a fan to fan out the dust and stuff.

Q. State to the jury what a fan is like, so they will understand the difference between a corn-sheller with a fan and one without a fan.

A. It is the same principle as a fanning mill; there is a fan or wheel with wings that goes around and fans the dirt and stuff out of the corn.

Q. Do corn-shellers generally have that improvement on them?

A. It is not an improvement.

Q. That attachment?

A. All manufacturers make some with fans and some without.

Q. So the corn-shellers with a fan is a general style of corn-shellers?

A. Yes, sir.

50 Q. And they are sold generally by other manufacturers, are they, corn-shellers with fans?

A. Yes, sir.

Q. And these corn-shellers either with or without fans were such corn-shellers as are manufactured and sold at various manufacturing companies that make those kinds of implements over the country, were they not?

A. Yes, sir; I suppose they are.

Q. Of a like kind?

A. Yes, sir.

Q. And that is true also of mowing machines; they are the same general kind as mowing machines generally that are manufactured and sold by other companies?

A. Each company has a pattern of its own.

Q. But they fill the same purpose and are in competition with other mowers of different makes?

A. They are all sold to cut grass with.

Q. They are as good as those generally with which they come into competition?

A. In some sections of the country some have a larger sale than others.

Q. But these mowers fill the bill for which they were intended which you manufactured?

A. We never had any complaint about them particularly.

Q. And they are in competition with the Buckeye, Wood and Osborn and other makes of mowing machines?

A. Yes, sir.

Q. And they held their own in competition with the other makes, the Excelsior, and etc.?

A. I couldn't say about that.

Q. They are designed to do that?

A. They are put on the market on their merits. We never sold as many as the Buckeyes.

Q. Don't have as big a business as they do?

A. No, sir.

Q. They are in competition with the Buckeye?

A. Yes, sir.

Q. And the other machines I have mentioned?

A. Yes, sir.

Q. And the other machines I have mentioned are what are known as "Standard" make?

Mr. LAMB: Objected to as immaterial, incompetent, and not proper cross-examination.

Overruled. Exception.

A. Please explain what you mean by "Standard." There are some mowers called "Standard" mowers.

51 Q. But the mowers I have named of different makes are mowers that are sold generally the country through so far as you know?

A. Yes, sir.

Q. Generally?

A. Yes, sir.

Q. In the market?

A. Yes, sir.

Q. And are well established mowers in the trade, are they not?

A. In some localities they are and others not.

Q. Will you tell me any localities where the Buckeye has not an established trade?

A. (Not answered.)

Q. On the matter of end gates you may explain to the jury what you mean by end gates, so we will get it in the record here?

A. An end gate or shovelling board.

Q. Are they the same thing?

A. Yes, sir. It consists of four or more boards, 42 inches wide and 36 inches long, nailed together on two cleats $1\frac{3}{4}$ by $1\frac{3}{8}$; there is a side board on each side hung on a device at the tail end of the wagon on the bottom, and they go up against the end of the wagon and are held there.

Q. Rear end of the wagon?

A. Yes, sir, and are held there by levers, one on each side. The farmer fills his wagon with corn in the fall, and drives to his corn-crib, and steps to the back end of the wagon, raises those levers, and the whole rear end of his wagon falls down, like that, (indicating), at about an angle of 45 degrees, and this end gate is level with the bottom of his wagon, and he steps on here with his scoop-shovel and immediately commences unloading his wagon. Ear corn can be shoveled like shelled corn and beans.

Q. They fulfil the purpose of hauling corn or any other matter that is hauled in a bed of a wagon that you can shovel conveniently, like wheat or corn?

A. I never knew them to be used for hauling coal.

Q. What (*do*) you call a shoveling board or end gate is an implement or piece of machinery that is manufactured and sold by the different manufactories, are they not?

A. Yes, sir.

Q. Like in a similar way are the corn-shellers and mowing machines?

A. Yes, sir.

Q. By manufacturers generally?

A. Yes, sir.

Q. And those that you manufactured and sold to the defendant, and that the defendant agreed to order were equal—served
52 the same purpose and were equally as good as others of other makes?

A. Yes, sir.

Q. I will show you this letter, which is identified as Exhibit "4," and ask you to state whether or not this is a letter written by the plaintiff to the defendant?

A. Yes, sir; I wrote that letter.

Mr. McIntosh: The defendant offers letter Exhibit "4" in evidence.

Admitted and read to the jury as follows:

Lincoln, Nebr., *Oct.* 30, 1893.

Kingman & Co., Des Moines, Ia.:

We have your order for car of shellers ready for shipment on Thursday, and intended loading them on Friday, but Thursday night our shops burned, and your car of shellers was destroyed. We have no fan-shellers on hand, but have plenty of shellers without fan which we can ship you in 15 or 20 days. Please inform us if we shall ship you a car-load of the latter as soon as we can get them out.

Yours truly,

WESTERN MFG. CO.
M. D. WELCH,
Sec'y & Treas.

Q. Do you know when the order referred to in Exhibit "4" was sent to the plaintiff?

A. 10 or 15 days, I guess, before I wrote that letter.

Q. I will ask you what is the date of the fire in the (penitentiary) at Lincoln, where your manufacturing plant was in 1893?

A. The evening of October 26th, 1893.

Q. What property did that fire destroy?

A. Destroyed the building owned by the State, the roof and floor of the building, and destroyed our wood-working machinery, and 1,600 end gates, couple hundred corn-shellers that were finished, and 1,200 or 1,500 that were in process of being finished, and other commodities stored in and about the place, the blacksmith-shop tools and machine shop.

Q. Was there any part of your plant for manufacturing either mowing machines, corn-shellers, or end gates that was not destroyed by that fire?

A. Well, we——

Q. Kindly answer the question?

A. One-half of our plant was destroyed by fire.

Q. I know your cooper shop was not touched, but I am talking about the part of the plant that was used in manufacturing end gates, corn-shellers and mowing machines?

53 A. The building that was burned contained the machines, lath-s, etc., where we turned up the mowers and corn-shellers. The end gates didn't require a shop. I think we made some of them out of doors.

Q. Answer the question if you can?

A. I undertook to answer it then.

Q. Kindly answer the question?

A. Yes, sir.

Q. What was it?

A. The cooper shop where we manufactured cooperage; we also manufactured corn-shellers in there, part of them.

Q. Did you manufacture corn-shellers in the cooper shop before October 26th, 1893?

A. Not wholly.

Q. Any part of them?

A. Yes, sir.

Q. What part did you make there?

A. We painted them upstairs in the third floor of the cooper shop, we used as store-room, a big room, repair-room, etc., but our main shop where we turned up the shafts and mowers and corn-shellers was destroyed.

Q. Was there any part of your plant that was not destroyed except that you might paint corn-shellers on the third floor of the cooper shop?

A. Yes, sir, we manufactured.

Q. Do you understand the question?

A. I say that the building where we manufactured the larger proportion, the main building, if you please, was burned for manufacturing our farm machinery, but as I stated before, we sawed the end gates and nailed them together outside, they didn't require any tools and machines, but it did to make shellers and mowers, and that was burned up.

Q. Didn't you a while ago (—) there were some iron bolts, on these end gates?

A. Yes, sir.

Q. You made those in your foundry?

A. Yes, sir.

Q. Your foundry was all burned up?

A. These were outside in barrels, and were not burned.

Q. How many were outside and not burned?

A. Bushels of them.

Q. I want to get at the number?

A. There were 10,000 castings.

Q. How many castings are used on a shoveling board?

A. Two.

Q. Is that all?

A. Yes, sir; two on the shoveling board, and two on the wagon-bed are small castings.

54 Q. That makes four?

A. Yes, sir.

Q. Are those all the castings?

A. Yes, sir.

Q. How many did you say you had outside?

A. I should judge we had a good many thousand.

Q. How many thousand?

A. I couldn't tell you the number. We had great barrels arranged along out there, and some of them on the ground outside; they didn't require any machine at all, and that was the reason they were put outside.

Q. Had those been in the fire?

A. Some of them had, and some of them hadn't.

Q. What portion of them had been in the fire?

A. Maybe half of them, but they were not injured by the fire.

Q. These were castings that had gone through the fire, and you had picked them up afterwards and put them in barrels?

A. No, sir; they were put in barrels after they were made.

Q. How many of these castings were there that had not gone through the fire?

A. I said that about half of them went through the fire.

Q. You had to put these together?

A. The nuts, bolts, etc., yes, sir.

Q. You didn't have anything of that kind, after the fire, did you?

A. No, sir.

Q. No facilities for making them?

A. We never made bolts; we bought them up town—common carriage bolts were used.

Q. I want a specific answer to this question, whether or not your entire plant for the manufacture of mowing machines, corn-shellers, and end gates was not destroyed by fire on October 26th, 1893?

Mr. LAMB: The plaintiff objects as the question has already been answered, and also as improper cross-examination.

Sustained. Exception.

Q. The building where this plant was located was a total loss except the walls, was it not, by the fire?

A. No, sir.

Q. What was rescued from the fire?

A. The progress of the fire was stayed in our machine shop, so that our lath-s and planer and drills was all taken out immediately and put in another shop and went to work with.

Q. You saved those?

A. Yes, sir.

55 Court now adjourned until 10 o'clock a. m. tomorrow morning.

M. D. WELCH—cross-examination continued by Mr. McIntosh:

Q. What machinery was required or did you use in the making of end gates prior to the fire in the year 1893?

A. We used a cross-cut saw to saw off the boards; the boards were 16 feet in length. We used a planer to plane the cleats; the lumber was already (planned), and so was the cleats in fact. We bought 2 x 4 cleats and split them with a saw so there was very little machinery used.

Q. What was it then?

A. That was all in the wood-work.

Q. Go on and tell what it was.

A. There was a good deal of machinery there, I can't tell everything without thinking a moment. The blacksmith work was riveting the levers together, and was done by hand. There was some holes that was drilled there into the (leavers)—that was not destroyed.

Q. That was done with machinery?

A. By a drill.

Q. The drill was run by a machine in the shop?

A. Yes, sir; the castings as I stated yesterday had no machine-work on them.

Q. How were they made?

A. They were cast.

Q. In your foundry?

A. I had no foundry.

Q. Where did you get these castings?

A. They were made by the party who was running the foundry.

Q. Have you given all the machinery that was required to make these end gates; this cross-cut saw that you speak of was run by the general machines in the shop was it, it was not run by hand?

A. No, sir, it was run by power.

Q. In the shop?

A. They run all the machines by the same shafting.

Q. In the shop there?

A. Yes, sir.

Q. And this drill that you speak of was also run by the power of shafting that run all the machinery?

A. Yes, sir.

Q. And all the castings were made in the foundry in that building?

A. Yes, sir.

Q. I asked you yesterday, but I have forgotten just what the answer was, but I want to ask what was the iron or metal
56 work about these end gates; I asked you if you described all the iron and metal work about these end gates?

A. No, sir.

Q. What was it you didn't describe?

A. The wrought-iron levers on the side.

Q. How large were these wrought-iron levers?

A. One about 18 inches, and the other 26, I think.

Q. That is, the two joints of the lever one 18 and the other 26 inches?

A. Yes, a fulcrum lever.

Q. How many joints were there to it?

A. One.

Q. And just these two pieces you have mentioned?

A. Yes, sir.

Q. How were those levers fastened to the bed of the wagon?

A. One of these castings with a bolt through it, and a bolt through the casting on either lever and a double nut to each.

Q. Were there any iron (roads) at the base of the shoveling board?

A. Yes, sir, a piece of gas pipe.

Q. Extending from one side of the bed to the other?

A. Yes, sir.

Q. Any other metal-work about this?

A. There was a little strip of iron to that that goes right in place.

Q. Where was all this metal-work made?

A. The gas pipe is made at Pittsburg.

Q. Where was it cut in lengths to suit you?

A. The factory.

Q. Where were the levers made?

A. Cut in lengths at the factory and riveted together.

Q. What factory?

A. Pittsburg, where we bought the iron.

Q. What part of these end gates were made in the foundry?

A. Nothing but the castings.

Q. Did you manufacture any end gates in the year 1894?

A. No, sir.

Q. Have not manufactured any end gates since the fire?

A. No, sir.

Q. This machinery by which you made these end gates was all burned in the fire, was it not?

A. No, sir.

Q. What portions of the machinery did you use in making these corn-shellers?

A. I used a large portion of it,

Q. Of the entire machine plant?

A. Yes, sir.

Q. And where was the metal-work for the shellers made?
57 A. Some of it made in Pittsburg, and some of it made in the foundry.
Q. In the foundry that was burned up?
A. Yes, sir.
Q. What was made in the foundry that was burned up?
A. All the castings.
Q. What part of a corn-sheller consist- of castings?
A. The crank, balance-wheel, picker-wheel, stripper-wheel, boxes, cob (quide,) and fan-pulley,—I guess that is all.
Q. And the wood-work you manufactured there in your shop at the penitentiary?
A. Yes, sir.
Q. What besides the poles of the mowers was burned?
A. I think there was about 25 or such a matter, about 25 mowers beams and boxes and fixtures were burned up.
Q. What else besides the poles?
A. That is what I stated.
Q. Is that all?
A. I think that is all.
Q. How many mowers were burned?
A. There was two complete mowers burned up and parts of 25 others about.
Q. When did you finish the manufacture of the mowers you claimed to have manufactured for the defendant before the fire?
A. I was always working more or less on mowers, I can't just state, we were making mowers all the time more or less, turning out shafts, etc., and certain seasons of the year we took them together. I think at the time we had 200 or more than 200 mowers finished and completed on the first of July, 1893.
Q. When did you manufacture the last mower prior to the fire?
A. I think that all of the mowers were completed and ready for shipment prior to October 1st.
Q. Was that after the completion of these mowers prior to October 1st you suspended the manufacture of mowers for the present?
A. Yes, sir; for that year.
Q. And there were no more mowers manufactured down to the time of the fire?
A. After October 1st there was no more mowers manufactured any further than to get the poles that had been burned up.
Q. You said something about a casting being made for Kingman's name on it. Will you describe what that casting is like?
58 A. A mower is composed of wheels and gearing of the mower, and the spur wheel, double pinion and double wheel occupy a place in the center of the mower, and keep the dirt out of it and the dust. There is a large casting something like the shape of the crown of that hat (indicating) and is fastened to a spring of the mower by a hinge, and goes over and covers that all up. That is about 10 inches long, 8 inches wide and 8 inches deep, made in the shape of an arc.
Q. Merely a cover for some of the running gear of the machine?

A. Yes, sir.

Q. And that had Kingman's name on it?

A. These mowers were Capitol mowers and had the word Capitol on them. After this contract was made, he required his mowers to be branded with his own name for Illinois and Missouri, and (Weir) for Kansas, and these gear covers were taken off and thrown in the (scrape) pile, and new one made with the word Kingman on them, and also with the words "Weir Standard."

Q. That is where you were fixing up the old mowers you had on hand at the time this contract was made, to fill the Kingman orders?

A. Not old mowers; parts of mowers, as I said. There were different parts of mowers, more of a stock of some than others.

Q. You called these different parts of a mower extras?

A. Yes, sir.

(*W.*) What was the number of these extras that had the name of the maker of the mower on it?

A. I can't tell the number.

Q. Do you know the price of that extra?

A. Yes, sir.

Q. What was it?

A. It was $2.65.

Q. Now, if at all, would you change that extra, and put another on with another name?

A. We had to make a new pattern.

(*A.*) You remoulded these extracts, and run them in a new pattern, and that was all there was to it?

A. Yes, sir.

Q. And that was a matter where you already had the piece, and merely wanted to change the name, what would it cost you (*you*) to do that?

A. I said we had to make a new pattern.

Q. After you had the pattern made?

A. I stated that we had to make a new pattern.

Q. I didn't ask you about it, suppose you had the pattern?

A. I didn't have it.

59 Q. Assuming that you did, now what would it cost you having that pattern to take a lot of extras with the name of one make on it, and change it to the name in this new pattern which you had?

A. I can't answer that.

Q. It wouldn't cost over 15c. would it, or would it cost that?

A. It would cost $15.00.

Q. For each one?

A. To make that gear cover pattern new. I had a wooden pattern with the word Capitol on it—I can't answer that question the way you put it.

Q. After you had the pattern, how much would it cost to make these extras over again; that assumes you have the material, and all you have to do is to melt it over again and run it into the new pattern?

A. You never run a foundry. You ought to know that extra cost to make it after I get the pattern?

Q. After you had the pattern and material, and simply made the old extra over with the new pattern?

A. We don't make old extras over.

Q. You wouldn't throw them away?

A. Throw it in the (scrape) pile, and it is all melted up.

Q. That is what I am talking about?

A. It is worth so much a pound.

Q. Is that the way you sold extras?

A. No, sir; do you want to know what it would cost me?

Q. Did you make any new castings for machines after the fire in 1893?

A. I did not.

Q. Were there any more made there in the (penitentiary) grounds?

A. No, sir.

Q. There was no foundry there after the 26th of October, 1893?

A. No, sir.

Q. And is not today?

A. Yes, sir.

Q. When was it established?

A. (Not answered.)

Q. You took an inventory of your stock on September 1st, 1893?

A. Yes, sir, I did.

Q. That was the last inventory before the fire?

A. Yes, sir.

Q. You took an inventory after the fire?

A. No, sir.

60 Q. Do you intend to tell this jury that there was no inventory taken of the stock left after the fire?

A. No, sir.

Q. You had insurance on your plant when it was burned?

Mr. LAMB: I object as not proper cross-examination and immaterial.

Sustained. Exception.

Mr. MCINTOSH: I want to make an offer to show the amount of insurance on this plant.

The COURT: I won't entertain it or sign any bill of exception with it in.

Mr. MCINTOSH: Will your honor allow the record to show that you refuse to let me make the offer?

The COURT: No. sir.

Defendant excepts.

Q. How many mowers did you have on October 1st; did the plaintiff have on October 1st, 1893?

A. 174.

Q. How many of these were 4½ feet and how many were 5 feet mowers?

A. My recollection is about half and half; possibly ⅓ 5 foot, and

⅔ 4½; possibly half and half; that was the usual demand for mowers in that proportion.

Q. These were all the mowing machines you had at that time?

A. Yes, sir.

Q. Taking up the matter of shellers, was the trade as good for shellers in 1893 as it was in 1892?

A. No, sir.

Q. The buildings which were burned down in that fire belonged to the State?

A. Yes, sir.

Q. Were they stone buildings?

A. Yes, sir.

Q. Where in the (penitentiary) are those buildings situated?

A. There was two buildings, shops, one is running along the south wall from east to west, and the other is along the west wall running from north to south; the one running from north to south the stone building, is the one that was partially destroyed.

Q. What part of it was destroyed?

A. The part containing my machine shop—the roof was burned off. That building had an "L" to it in which the engine was located and the boilers. While it was damaged some of it was
61 saved intact. The "L" didn't burn any further than some of the roof was burned off, and then turned the corner, and went on, and burned the corner where my machine was situated; the roof was burned off of it, and the next floor fell down over this machinery, and left the roof over it, so the machinery was damaged by the fire much.

Q. The machinery was damaged by fire?

A. No, sir.

Q. What machinery did you have in this shop you say was partially saved?

A. The lath-s, drills, planers, and such machines as are used in every machine shop.

Q. But all the frame-work for handling machinery was burned and destroyed by fire?

A. I don't understand.

Q. And the facilities for handling the machines were all burned?

A. You mean making it?

Q. That is, the machinery you used to make these implements with?

A. I don't understand that.

Q. That was at the north end?

A. Which was?

Q. This portion of the machinery that was saved?

A. Yes, sir.

Q. Then how many rooms were in this building that were burned?

A. Altogether above and below?

Q. Yes, sir; and state what was in each room?

A. The foundry was at the end of this building, a wooden structure that was all destroyed. Then on the first floor of that building was our wood-work shop where our wood-working machinery is located;

our planer, lath-s, boring-machines and (shappers), etc., and that was destroyed. The next room was the blacksmith shop, and there was not any machinery in there, except the blower to make wind for the furnaces. The next two rooms was the machine shops which were—the machinery in there was damaged very little, and that mostly by water—that completes the first floor. The second floor the first room on the south end of the building is what we call the setting-up room or packing-room, and that was burned. That is where the end gates were burned that were ready for shipment, and some parts of these mowers that were gotten over there, removed from another building to be packed, and were packed up. The little extra parts in boxes awaiting orders for shipment, that was burned. The next was the paint shops in which the poles of the new mowers were all burned up, and that was burned. The next was our office, and that was burned. The next was the harness shop occupied by another
62 contractor, and that was burned, partially, and the roof off. That room is the one that was directly over the machine shops; it destroyed the joist of that shop, and the floor fell down over these machines, and preserved the machinery and the fire stopped there.

Q. What implements did you make with machinery in this what you call the machine shop, that you say was saved?

A. We didn't make any implements in there entirely, but prepared shafting and done drilling, etc. We constructed and used these machines to make different parts of all machines made, but not wholly.

Q. You couldn't make any machines from what you saved from the fire? (Q.) What could you make?

A. Anything we did before.

Q. You couldn't make it with the facilities that you did before?

A. No, sir; we could make them by hand.

Q. You mean you could make them then by hand?

A. We have been making shellers right along after the fire in 10 days.

Q. Have you been making end gates?

A. No market for them.

Q. Or no mowing machines?

A. I said no, sir.

Q. Were these buildings that were burned ever reconstructed?

A. Partly, I think now at this time the whole of it.

Q. I show you this letter which is dated October 30th, 1893, and ask you whether or not that is in your handwriting; the letter is marked Exhibit "4."

A. Yes, sir; I said yesterday I wrote that.

Mr. McIntosh: I offer in evidence the letter which is marked Exhibit "4."

Admitted and read as follows:

Lincoln, Nebr., *Oct.* 30, 1893.

Kingman & Co., Des Moines, Ia.:

We have your order for car of shellers ready for shipment on Thursday, and intended loading them on Friday, but Thursday

night our shops burned, and your car of shellers was destroyed. We have no fan-shellers on hand, but have plenty of shellers without fan, which we can ship you in 15 or 20 days. Please inform us if we shall ship you a carload of the latter as soon as we can get them out.

Yours truly.

WESTERN MFG. CO.
M. D. WELCH,
Sec'y and Treas

63 Q. I will show you this other letter, which is marked Exhibit "5," and dated October 30th, 1893, and ask you to state whether or not that letter is in your handwriting?

A. Yes, sir; I wrote that letter.

Mr. McIntosh: I offer Exhibit "5" in evidence.

Admitted and read as follows:

LINCOLN, NEBR., *Oct.* 30, 1893.

Kingman & Company, Peoria, Ill.

GENTLEMEN: We presume you have saw in the paper about our fire last Thursday, but as the papers did not have it near right, we will state for your informatian that the fire first started in the foundry, and quickly communicated with the wood shop, and made a clean sweep of those two departments, also including our blacksmith, machine, and paint shops, store-room, and office. The books in our safes was all we saved. The building in which our cooper shops were located was not burned, nor was the engine and boiler houses. We expect to be running these shops again this week. We (have) the car-load of corn-shellers for your Des Moines house in our paint shop, and intended to load them the next day. They were all burned, also the 1,600 Climax end gates, which we got out on your order. Our stock of mowers were stored over the cooper shops, and were not burned or damaged. Our losses are about $20,000, on which we have an insurance of $13,500. We cannot fill any orders for fan shellers for some time, but can supply you no fan in about 15 or 20 days.

Yours truly,

M. D. WELCH.

Q. When you (saw) in this letter "the building in which our cooper shops were located were not burned, nor was the engine and boiler house-, and we expect to be running these shops within a week," you referred to the cooper shops?

Mr. Lamb objects as not proper cross-examination and incompetent.

Sustained. Exception.

Q. You may state whether or not your cooper shops were temporarily affected by the fire?

Mr. Lamb objects as not proper cross examination, immaterial and irrelevant.

Sustained. Exception.

Q. Prior to the fire you never made any implements in the cooper shops?

64 Mr. Lamb objects as irrelevant and immaterial and not proper cross-examination.

Sustained. Exception.

Q. I show you this letter dated November 2nd, and ask you to state whether or not you received that letter?

A. I did.

Mr. McINTOSH: I offer the letter referred to in evidence, which is marked Exhibit "6." Admitted and read as follows:

Nov. 2, '93.

Western Mfg. Co., Lincoln, Nebr.

GENTLEMEN: Yours of Oct. 30th, giving particulars of the fire, is received and noted. We would judge that the fire was not so severe as the accounts given in the papers would indicate. We note that you will not be able to furnish any shellers excepting without fans for some time. We have written our Des Moines house, and they say that they must have the shellers with fans, hence we will try to supply them with some that we have at our other houses until you get into running shape.

Yours truly, KINGMAN & CO.

Dictated by Martin Kingman.

—. In your letter of November 9th, how did you ascertain the number of corn-shellers partly completed, but having no fans, that you mentioned in this letter?

A. I had some one of my employees count them up.

Q. And so you ascertained just how many shellers you had by making a count at that time, and that is why you wrote it in the letter?

A. I had a man at work.

Q. These figures represent a true statement of the partially completed corn-shellers that you had at that time?

A. I believe they do.

Q. And these were all you had so far as you know; is that right?

A. In what shape?

Q. Partly completed.

A. No, sir.

Q. Did you have any completed?

A. Nearly completed, in all processes.

Q. These you say here were partly completed?

A. I will explain.

Q. Answer the question?

A. Yes, sir.

65 Q. And you had none that were completed?

A. Yes, sir.

Q. And then why didn't you fill your order?

A. They wanted some with fans. I suppose that is the reason I didn't have any of these completed at this time.

Q. In the conversation of November 22nd, 1892, do you intend to have the jury understand that you visited Peoria on that date, arriving on the 22nd for the exclusive purpose of seeing the defendants about this contract?

A. Yes, sir.

Q. Did you tell Kingman when you first talked with him that you had come there for another purpose?

A. No, sir, not at that time.

Q. Now, did you give any reason—have you any reason you want to give now why you didn't store these machines that you claimed to have had for the defendant, when they told you to do so, in their letter of November 18th?

A. Yes, sir, I have a reason. I had offered to store these machines for him when I met him in Chicago. I offered to store them for him if he would pay for them according to the contract; that I would give him a warehouse receipt for these goods and had them in store, and did want to do so, if he would settle for them, and he said he wouldn't do it, and he had storage of his own; I declined to do that, and when he wrote me, and said to put them in storage, I interpreted that I was to carry them over, and not settle for anything.

Q. They were perfectly solvent in case you had stored them, and that was a delivery of the goods?

Mr. LAMB: Objected to as incompetent, irrelevant and immaterial, and not proper cross-examination.

Sustained. Exception.

Q. How long did this (*consider*ation) in Kingman's office of November 23, 1893, last?

A. Not to exceed an hour.

Q. Did it exceed a half hour?

A. I am talking about the same conversation; the conversation was probably accomplished in about 30 or 40 minutes.

(*Q.*) Yes, sir, I had some conversation with Mr. Schimpff.

(*A.*) Was Mr. Kingman there?

A. Yes, sir; part of the time.

Q. And you had some conversation with Mr. Kingman in the general meeting-room, did you not?

A. No, sir.

Q. In what they called a reception-room, didn't you have some conversation about the state of the trade?

A. We might have passed some remarks.

66 Q. In your direct examination have you fully stated all that you can remember of this conversation?

A. There might something turn up that he said of some matters might come to my memory.

Q. You have nothing further that you wish to add to that conversation?

A. There was one thing that I though- of this morning that I didn't state in my evidence in this conversation, that I had with him. I reminded him at that time that he made an offer in the

summer—in July I think it was; it was when I was there—that if he wasn't going to do anything in this territory that he would let me take it and sell these goods; that I was in an embarrassed condition financially, and had these goods on hand, and wanted to get rid of them, and get the money out of them, and use it in paying my debts, and he demanded and said that he would attend to the territory, there was no trouble but what he would sell the goods; and I reminded him of that conversation, and showed that he had (—) only refused to sell the goods himself, but had refused to let me put a man in the field and sell them. I also told him there was not a year I had manufactured these end gates that I had sold less than 3,000 in the States of Nebraska and Iowa alone, and it was too bad to have us thrown out of the market as we had been. The competition was so fierce that the prices were reduced and it was a great damage to us, and I used this (*this*) argument on him to get him to settle up, and get his paper. I don't think I went into that yesterday.

Q. Is there anything further that you think of?

A. Not that I think of now; there might be something.

Q. When you was selling these end gates yourself, what were you getting for them?

A. I first started to sell them for $24.00 a dozen, but the price has gradually declined until it got to be down to $18.00 to dealers; I think that was the lowest.

Q. And you have always been able to sell about 3,000 in Nebraska, alone?

A. Nebraska, Kansas and Iowa.

Q. When this conversation occurred, where was Kingman sitting?

A. He was sitting directly opposite me, at his desk.

Q. You sat on one side of his desk, and he on the other; it being a flat desk?

A. Yes, sir.

Q. Was there any one else in the room?

A. My recollection is there was no one but Schimpff.

Q. Where was he sitting?

A. Alongside of Kingman, about 6 feet away, at another table that was in line with his desk at his left.

67 Q. Did you retain the chair that you occupied during the entire conversation?

A. It was a stool.

Q. Sat there all the time, did you?

A. I think I did, but I might have gotten up for something.

Q. When did you make your efforts to try and sell these cornshellers?

A. Immediately after my return from Peoria.

Q. You wanted to sell them?

A. Yes, sir.

Q. I will show you this letter which is marked Exhibit "7." (*Q.*) I will ask you, if, after (*he*) left Peoria, and returned to Lincoln, you consulted your attorney about this matter?

A. Yes, sir.

Q. When did you return to Lincoln?
A. I arrived in Lincoln on the 25th.
Q. And from that time on you were under the advice of counsel in this matter?

Mr. LAMB: I object as incompetent, irrelevant and immaterial and not proper cross-examination.
Sustained. Exception.

Q. You didn't say anything further to them than you wouldn't do anything now; you wanted to consult an attorney, and left at the end of the conversation, or words to that effect?
A. "That I wanted to consult my associate in business as well as my attorney."

Mr. MCINTOSH: I now offer in evidence the letter (identified) as Exhibit "7."
Admitted and read as follows:

DEC. 4, '93.

Western Mfg. Co., Lincoln, Nebr.

GENTLEMEN: We wrote you last week with a proposition, to which we have not had an answer. We now write to ask you to enter our order for one car of shellers to be shipped to Peoria, all with fan and feed-table—shipment to be made at once.
Please advise us by return mail just when you will ship them. Also please see that these shellers are bright and fresh, as we presume that they are from the fact that Mr. Welch stated that they were just being finished up. Kindly let us hear from you.

Yours truly,

KINGMAN & CO.,
By M. KINGMAN, *Pt.*

68 Q. You didn't say to them at all what you would do, you simply would consult the attorney in the situation?
A. No, sir; I didn't tell them that I wouldn't do anything; they asked me to settle with them for what goods had been sold, but I refused to do that, and had no further business with them, until I returned home, and consulted my associates.
Q. And consulted your attorney?
A. I don't know whether I said attorney or not.
Q. Did you receive a telegram from the defendants the 12th of December, 1893?
A. I can't recollect.

Mr. MCINTOSH: I offer in evidence letter produced by the defendant under date of December 12th, and marked Exhibit "8."
Admitted and read as follows:

DEC. 12, '93.

Western Mfg. Co., Lincoln, Nebr.

GENTLEMEN: You will please enter our order for 200 hand-shellers to be shipped to Kansas City, 60 per cent. to be with fan and feed-table, the balance without fan. We trust that you will be able to

get these off within ten days, as the sheller trade (-as) sprung up quite brisk of late.

We await your early answer.

Yours truly,

KINGMAN & CO.,
By M. KINGMAN, *Pt.*

Q. I show you this letter dated December 15th, 1893, and ask you to state if that is a letter written by the plaintiff to the defendant of that date?

A. Yes, sir; that is dictated by me.

Q. You wanted to sell shellers; why didn't you sell them to us when we ordered them from you on December 4th and again on December 12th?

A. Mr. Kingman had absolutely refused in Peoria to buy a sheller; he said his warehouses were full and he didn't want any shellers, and he wouldn't take them at any price; except his Des Moines house, he said that was the only one that wanted any shellers, and they would get along without buying any for them; they had enough to ship them from Peoria, and other branch houses and when I got home he put in orders for shellers, I supposed he was trying to crawl under the tent. He had absolutely refused
69 and terminated the contract and invited me to sue him, and under that would have been improper to commence under that contract, and sell shellers.

Q. You didn't pay any attention to these orders at all?

A. No, sir.

Redirect examination.

By Mr. LAMB:

Q. He examined you with regard to the 4½ and 5 foot mowers, state to the jury whether or not the entire running gear, and everything except the cutting gear were alike.

A. They were.

Q. State whether or not the cutting gear of the shellers was supplied to you in different lengths ready made.

A. Yes, sir.

Q. You may state how long it required you to get new supplies and fill orders for different lengths that were ordered from what you happened to have in stock.

A. Two or three weeks.

Q. And the different sizes of mowers or different grades made no difference in your ability to fill orders excepting a short delay in obtaining a different length of cutting bar?

A. No, sir.

Q. He asked you with regard to the number of shellers and you said (—) had 394 no fans and 397 fan or conversely in part process of preparation ready to be delivered; did you in addition thereto also have other material so you could have completed and filled orders in the usual way of ordering in the business?

A. Yes, sir; I could have filled his orders for all shellers due him under the contract before the expiration of the contract.

Q. He said with regard to end gates, you may state whether or not you had castings and material ready to set up for a sufficient number of end gates to have filled his orders, notwithstanding the number that were burned up that you had prepared for him, and stamped with his name.

A. Yes, sir, and have them yet, they were not in the fire; the levers were piled up outside of the shop, and were not burned, the castings I have already spoken of.

Q. You may state if at any time you were there, about November, he ever made any order for any mowers or any end gates.

A. No, sir.

Q. Didn't seek to renew the contract then by letter by ordering any mowers?

A. No, sir.

Q. Nor end gates?

A. No, sir.

70 Q. You may state what your reason was for declining to fill the order for shellers in December.

A. (Not answered.)

Q. He has asked you with regard to the destruction of these several buildings, you may state whether or not you had on hand after the fire all the requisite and necessary castings for setting up the shellers.

A. No, sir, we did not.

Q. Where could these be secured?

A. Right there in town.

Q. About how long a time would it take to prepare or provide them?

A. I had them making them immediately after the fire.

Q. Was there any time after that fire when your company couldn't have filled the orders of this defendant within a short time, and according to the usual custom of trade between you and them touching any or all of these several articles?

A. I think that after 15 or 20 days after the fire, I was in a condition to comply with the terms of the contract as to furnishing him what he had ordered under that as promptly as I had ever before.

Q. Calling your attention to it, you stated the list price of that was $2.65?

A. Yes, sir, there was two castings.

Q. What were the castings worth, not what the net price was?

A. There was one casting——

Q. Give the worth of each one.

A. There was a tool-box cover and a gear cover.

Q. Give it in dollars and cents.

A. They were worth $2.10 to us.

Q. Each?

A. No, sir, for the two.

Q. How much for the two?

A. Its price was $2.65, they were worth more than that; $2.65 with 25 per cent. off and 50c. and 25 off.

Q. Get at the value of them.

A. They were worth to us $2.35.

Q. For the two?

A. Yes, sir.

Q. State whether or not in the sale of these particular mowers with the stamp or brand on for your trade, what effect upon the saleable value of these mowers the stamp that is now put upon the casting and (took) box has; what is the particular effect of it as to whether it diminishes the saleable value or increases it?

A. It would be in this territory where they are known.

71 Where it would be new and untried without a record there is a fierce competition in mowers, and it must have an established reputation in order to sell.

Recross-examination.

By Mr. McIntosh:

Q. If they were sold in Illinois, would it (effect) their value there?

A. (Not answered.)

Redirect examination.

By Mr. Lamb:

Q. Referring to your letter that you wrote stating the extent of the injury of the works where you manufactured these agricultural implements, state whether or not at the time you wrote that letter the roof had been taken off, the roof that had fallen down over this machinery had been taken off, so you could ascertain the extent of the injury?

A. Nothing had been done. I was waiting for the fire adjusters and no examination had been made of any kind or description at that time. It wasn't made for 10 days after the fire, and when this roof or floor was removed, the machinery proved to be damaged but very little, and I know that they made a partial loss of it.

W. H. Manning, called as a witness and sworn on behalf of the plaintiff, and examined by Mr. Lamb, testified as follows:

Q. You are a resident of the city of Omaha?

A. Yes, sir.

Q. How long have you lived there?

A. 27 years.

Q. What is your business?

A. General agent of Emerson, Talcott & Company of Akron, Illinois.

Q. What is their business?

A. Manufacturing mowers, hay-rakes, and agricultural implements.

Q. How long have you been their agent?

A. 12 or 13 years.

Q. How long have you been engaged in the sale of machines in this city?

A. Since I have resided here.

Q. You are, as such agent, acquainted with the trade in this part of the State?

A. I am.

Q. Are you their general agent in the State of Nebraska?

A. Yes, sir.

72 Q. Do they wholesale machines?

A. Yes, sir.

Q. Mostly throughout Nebraska?

A. Yes, sir.

Q. Keep them in storage here?

A. Yes, sir.

Q. Were you acquainted with the condition of trade in mowers during 1893 and 1894?

A. Yes, sir.

Q. You may state what has been the state of the market with regard to demand and supply during the years 1893 and 1894.

Mr. McIntosh: I object as immaterial and not responsive to the issues.

Overruled. Exception.

A. The trade in 1894 was not as large nor as good either as in 1893, both years in fact were very poor trade so far as our line of goods, (*more than*) hay rakes.

Q. About what was the percentages of falling off in demand as you say for the (*reasons*) of 1894 after the season of 1893 was past?

A. I should think the trade had fallen off fully one-half.

Q. State what time during the year manufacture-s and dealers in mowers make their orders; what is the season for the sale of these goods?

Mr. McIntosh: I object as immaterial and not responsive to the issues.

Overruled. Exception.

A. Usually in the fall, October into December.

Q. For the following years?

A. Yes, sir.

Q. Now, you may state what was the decline in price of that character of goods from the fall of 1892 and spring of 1893 to the fall of 1893 and spring of 1894?

Mr. McIntosh: Objected to as immaterial and not responsive to the issues.

Overruled. Exception.

Q. Confine your time to after the 1st of October, 1893?

Mr. McIntosh: Same objection.

Overruled. Exception.

A. Do I understand what would be the depreciation in prices from October, 1893, to the spring of 1894?

73 (A.) You may state what is the depreciation in goods of this character after the 1st of October, 1893?

Mr. McIntosh: I object — Mr. Lamb's asking what was the depreciation as immaterial and not responsive to the issues.
Overruled. Exception.

Q. About what was the depreciation, if any, in the price of mowers of this character between the season of 1893 and that of 1894, after the 1st of October, 1893?

Mr. McIntosh objects as immaterial and not responsive to the issues.
Overruled. Exception.

A. If I was selling mowers in October, 1893, it would virtually be for the trade of 1894.

Mr. McIntosh: I object as not responsive.
Overruled. Exception.

A. As I said the contract price made in 1893; the depreciation as between the trade of 1893 and 1894 as to the value of mowers, I should judge they would depreciate from 5 to 10 per cent. between two seasons.

Q. Now, you may state what the condition of the market in the fall of 1893 for the season of 1894 was; as to the supply and demand?

Mr. McIntosh objects as immaterial and not responsive to the issues.
Overruled. Exception.

Q. There was quite a large stock of mowers surplus on the season of 1894, a larger stock probably than there was for the season previous of 1893.

Cross-examination.

By Mr. McIntosh:

Q. What was the market value of a mower capable of doing as good work as mowers generally do, and in legitimate competition with well-known mowers in the trade, such as the Wood, Osborn, and Buckeye mowers, worth in the market, f. o. b. Omaha in the fall of 1893, first confining your answer to a mower with a four-and-a-half-foot cut?

Mr. Lamb object- as incompetent, immaterial, and not proper cross-examination.
Overruled. Exception.

A. It would depend entirely upon what mower it was and the terms of the contract.

74 Q. I am talking about the market now.
A. It would depend upon whether it was a cash sale or a time sale.
Q. Say it was sold in the fall of 1893, one-half cash January 1st, 1894, and the other half October 1st, 1894?

Mr. Lamb makes the same objection.
Overruled. Exception.

A. I couldn't tell hardly as to the value of some of the mowers.
Q. You couldn't tell?
A. No, sir.
Q. What mower did you represent at that time?
A. The Standard.
Q. The wholesale market value of your mowers f. o. b. Omaha on the terms suggested in the question in the fall of 1893, was what?

Mr. Lamb makes the same objection.
Sustained. Exception.

Q. What mower did you represent?
A. The Standard.
Q. The Emerson Standard?
A. The Emerson Talcott.
Q. What was the market value f. o. b. Omaha in the fall of 1893 of the Emerson Standard mower, payable half cash, January 1st, 1894, and the balance October 1st, 1894?

Mr. Lamb makes the same objection.
Sustained. Exception.

Q. Do you know anything about the mowers in controversy in this suit?
A. The Capitol mower?
Q. The Kingman & Weir mower.
A. I don't know the Kingman & Weir mower.
Q. Nor the Weir mower?
A. No, sir.
Q. Or the Kingman mower?
A. No, sir.
Q. You don't know anything about them?
A. I have never seen one marked that way.
Q. One as what you spoke of as the old "Capital?"
A. I think the first I knew of the Capital mower, made by the Western Manufacturing Company was in 1885 or 1886; I think about 10 years ago it first came out.

Witness excused.

75 D. P. MARSH, called as a witness on behalf of the plaintiff and examined by Mr. Lamb, testified as follows:

Q. You are a resident of the city of Omaha?
A. I am.
Q. How long have you lived here?

A. 12 or 14 years about.
Q. How long have you lived in Nebraska?
A. The same length of time.
Q. What is your business?
A. I am engaged in the implement business.
Q. You may state whether or not you are engaged in the sale of mowers; and, if so, for how long have you been engaged in that business.
A. For the past three years.
Q. You may state what mower you have represented.
A. The Crown mower, manufactured by the (Jaynesville) Machine Company.
Q. Of (Jaynesville), Wisconsin?
A. Yes, sir.
Q. Have you during that time had a storage warehouse here?
A. We have a transfer contract, and carry a stock of goods here.
Q. You have been general agent for the State?
A. Yes, sir.
Q. And for the disposition of machines throughout this State?
A. Yes, sir.
Q. And as such you have been acquainted with the trade of mowers in this State?
A. Yes, sir.
Q. Had you previous (—) that time also handled mowers?
A. No, sir; not to any extent.
Q. But you have been handling them quite extensively during the past three years?
A. I can't say as extensively as some.
Q. Have you during that time known what the condition of the trade has been, and the market with regard to the demand and supply for mowers in this State for the past three years?
A. It has been my impression that the supply exceeded the demand.
Q. What has been the cause of that?
A. General depression of business conditions, I think.
Q. Now, you may state, if you know, about how great the depression in the price of mowers and the value of mowers in this
76 market has been, say, between the seasons for mowers of 1893 and 1894, following October 1st, 1894; following the season of 1893, and following the 1st of October, 1893?

Mr. McIntosh objects as immaterial, and not responsive to the issues, and no foundation laid.
Overruled. Exception.

A. I should judge the depreciation would be between 5 and 10 per cent. diminution.
Q. And with regard to the supply and demand, about what diminution was there for the demand for mowers after October, 1893?
A. I think fully 33 and ⅓ per cent.
Q. Are you acquainted with these Kingman & Weir mowers?
A. I have never seen them.

Q. This depreciation in the prices of mowers between the season of 1893 and 1894 is due to this falling off of the demand?

A. I presume that had its influence.

Q. And other influences combined with that?

A. The general result of all influences operated on the market during that period.

Q. Say of a lowering of the price of 5 to 10 per cent. on mowers, would that be right?

A. That would to the best of my judgment.

Witness excused.

JOHN C. FETZER, called as a witness on behalf of the plaintiff, sworn and examined by Mr. Lamb.

Q. You reside in the city of Omaha?

A. Yes, sir.

Q. How long have you lived here?

A. 12 years.

Q. What has been your business?

A. Special agent of Parlin, Orendorff & Martin Company.

Q. What is the business of that company?

A. General line of implements, wholesale.

Q. As such, where is their place of business?

A. 9th & Jones streets, Omaha.

Q. Over what territory does their business extend?

A. All Nebraska, the west third of Iowa, the southern two tiers of South Dakota, and some of Colorado and Wyoming.

Q. Have you been actively engaged in that business, personally understanding the purchase and sale of goods in this State?

A. Yes, sir.

77 Q. Have you knowledge of the condition of the market of those goods as to supply and demand?

A. Yes, sir.

Q. You may state what the condition was for those goods in the fall of 1893, after November, 1893, and since that time as compared to what it was previous to that time.

Mr. MCINTOSH: I object as being too indefinite and as immaterial and not responsive to the issues.

Overruled. Exception.

A. Do you mean a general line of goods?

Q. I refer particularly to sheilers and end gates.

A. The market has been glutted.

Q. Has the company you represent been dealing in these extensively as other companies?

A. Yes, sir.

Q. Over the territory you have described?

A. Yes, sir.

Q. You may state about what, if any, was the general diminution or decrease in prices, if any, arising from the supply and no demand in the kind of goods after the season of 1893 was over.

Mr. McIntosh: Same objection.
Overruled. Exception.

A. That would depend whether a manufacturer or wholesaler. There was a general decline in implements on account of the panic and people afraid to buy, and in mowers was about 5 or 10 per cent., while in regard to wholesalers, the largest inducements would have to be offered to them.

Q. Were you acquainted with the corn-sheller made by the Western Manufacturing Company?

A. Yes, sir.

Q. How long have you been acquainted with them?

A. 6 or 7 years, and possibly longer.

Q. You may state what for wholesale lots or large lots in your opinion, that sheller would be sold for in the market in November and December, 1893.

Mr. McIntosh objects as immaterial and not responsive to the issues.
Overruled. Exception.

A. In large lots?

Q. Yes, sir.

A. I don't think they could have been sold for the costs of manufacturing.

Q. Fix the general price, and give it in money?

A. Not over $3.00; they had a cheap sheller.

78 Q. And what probably for the end gates?

A. That is one whole sheller without a fan.

Q. And what probably for end gates, Climax end gates?

Mr. McIntosh: Same objection.
Overruled. Exception.

A. I wouldn't think over $9.00 a dozen, it was a very cheap end gate.

Q. About how much addition would be probably for fans?

A. The manufacturer asks from 25 to 50c. and they generally get what they ask.

Q. Additional?

A. Yes, sir.

Cross-examination.

By Mr. McIntosh:

Q. Do you know anything about the territory of Illinois?

A. Nothing at all.

Q. Or Western Iowa?

A. Very little.

Q. Or Missouri?

A. The northwest corner only.

Q. Kansas?

A. Nothing at all.

Q. Arkansas?

A. Nothing at all.
Q. All of South Dakota?
A. The south half.
Q. Anything of Indian Territory?
A. No, sir, nothing at all.
Q. When you give your answer, you simply offer it as your opinion *or* what they would be sold for?
A. Yes, sir, there would have to be a big bargain.
Q. You were not selling any at that time?
A. Not in large lots.
Q. In small lots?
A. Very few.
Q. What did they sell for in small lots?
A. We sold different shellers, I think Kingman & Company——
Q. What did you get for yours?
A. $5.50.
Q. How large lots did that apply to?
A. One or two at a time.
Q. How about end gates?
A. They could be bought from $14.00 to $18.00 a dozen in lots from one-half dozen to two dozen.

79 Q. And what were these shellers and end gates worth in large lots?

A. In ordinary times?
Q. In the fall of 1893?
A. These shellers were ordinary shellers.
Q. Ordinary shellers?
A. I wouldn't think they would be worth $3.00 apiece.
Q. You mean ordinary shellers?
A. No, sir; these shellers.
Q. I am talking about ordinary shellers?
A. It would depend upon different shellers, some have a cast (ax*el*), and others have a turned steel shaft, and there is some difference, it depends upon how they are constructed and finished.
Q. What were shellers worth that were capable of doing good work, and stood in active competition with all other shellers that did good work, in the market, in the fall of 1893?

Mr. Lamb objects as incompetent, irrelevant and not proper cross-examination.
Sustained. Exception.

Witness excused.

Court now adjourned till Monday, 9.30 a. m.

Defense.

Mr. McIntosh: On behalf of the defendant, I now make a motion to nonsuit the plaintiff on the ground that under the pleadings and the plaintiff's evidence, the plaintiff cannot recover.
Overruled. Exception.

M. D. WELCH, called as a witness on behalf of the defendants and examined by Mr. McIntosh, testified as follows:

Q. The lettering done on these mowing machines for Kingman & Weir—Kingman was put on one machine and Weir on the other?
A. Yes, sir.
Q. And the piece was put on in pursuance of the contract of May 8th, with the understanding and request of the parties?
A. Yes, sir.
Q. As you manufactured the machines?
A. Yes, sir.
Q. Now at the time of the fire, you were insured, were you not, or were you?
A. Yes, sir.
Q. Have you a copy of the inventory made at the fire by the insurance adjusters?
A. I have a copy of the loss by the fire made by myself and submitted to the insurance adjusters. I also have an apportionment sheet.
Q. Will you produce it?
A. Yes, sir.
Q. Now, after the fire, the plaintiff went out of the agricultural implement business except in so far as it is necessary to clean up the goods left by the fire?
A. I was forced out of it, but I didn't go out of it voluntarily.
Q. You went out of the agricultural implement business?
A. I stopped manufacturing because I was unable to do so as the buildings were burned up.
Q. With the facilities which you had for the manufacture of mowing machines at the time the contract of May 8th, 1894, was made, about how many mowing machines a day were you able to turn out?

Mr. Lamb objects as immaterial and irrelevant.
Overruled. Exception.

A. I suppose I could get out 20 a day if I wished to; I never did, but I had facilities for manufacturing largely.

Witness excused.

C. P. DICKSON, called as a witness on behalf of the defendant, sworn and examined by Mr. McIntosh, testified as follows:

Q. What is your business?
A. I am shipping clerk for the Western Manufacturing Company.
Q. Plaintiff in this suit?
A. Yes, sir.
Q. How long have you been in the employ of the plaintiff?
A. For six years or a little over.
Q. I will show you a picture of a corn-sheller here marked Exhibit 6 b, and will you point out to the jury the parts of the unfinished shellers, on hand at the time of the fire, that were not completed; try to make your answer clear so that all the jury will understand it?

A. Do you mean what part was not completed, and how many?
Q. Take your own way of answering the question?
A. We had some on hand that were completed all excepting the painting.
Q. How many of these?
A. I don't know.
Q. Were there more than half a dozen?
81 A. Yes, sir; but I wasn't in that part of the business at that time and I kept no account of them.
Q. Speaking of the body of unfinished shellers at the time of the fire; just point to the jury the parts that were not completed of the shellers?
A. There were part of them that were completed except the paint, and part of them the frame-work was completed, but didn't have the casting or gearing on the inside.
Q. What do you mean by the frame-work?
A. The posts and side rails wasn't in.
Q. You may state whether or not these corn-shellers have been finished up since the fire?
A. Yes, sir.
Q. When did you finish completing them?
A. I couldn't say.
Q. About when; give the month?
A. I think along last March some time.
Q. March, 1894?
A. Yes, sir.
Q. How many were there of these shellers?
A. I think between 700 and 800.
Q. State whether or not those are all the shellers the plaintiff has constructed since the fire?
A. No, sir; it is not.
Q. Not all that has been constructed?
A. No, sir.
Q. What others has been constructed?
A. There has been none constructed, but there are parts of shellers left yet.
Q. You have some parts of shellers left there, but you have constructed none, except this 800, that were partly completed at the time of the fire?
A. No, sir.
Q. Have you any parts of shellers except the shaft that goes through the shellers?
A. Yes, sir.
Q. What have you besides shafts?
A. We have part of the casting that constitutes gear.
Q. What castings have you?
A. A (—) feed spouts, part of the lower cob (shoots) and several boxes.
Q. How many feed spouts have you?
A. I couldn't tell you.
Q. Haven't you thought of this since Saturday?

A. Yes, sir.

Q. You told me Saturday that you had nothing but these shafts?

82 A. No, sir, I didn't, but I told you we did.

Q. You have no wood-work?

A. No, sir.

Q. You may state whether or not the plaintiff's machinery for shaping and preparing all of the wood-work of shellers was destroyed by fire?

A. Yes, sir, they were.

Q. And of the end gates the same?

A. Yes, sir.

Q. In these end gates, the body of the end gate is of wood?

A. Yes, sir.

Q. Has the plaintiff ever replaced that destroyed machiney?

A. No, sir.

Q. What of the mowing machines besides the tongues were burned?

A. I think there were a few sickle-bars.

Q. You may state when the tongues — were destroyed in the fire were replaced?

A. I couldn't say just when.

Q. Give the month?

A. I couldn't do that. (*A.*) They were got during the winter during the fire, I don't remember the month.

Q. Was it the spring of the year?

A. No, sir.

Q. Was it after January 1st?

A. I don't know.

Q. I will ask you if it was not after January 1st, 1894, that these tongues were furnished?

A. I couldn't swear when it was.

Q. I will ask you if it wasn't after that date?

A. I don't know.

Q. Whom did you get the tongues from?

A. I think it was from the Baum Hardware Company.

Q. Of where?

A. Omaha.

Q. (*Whose*) manager of the Baum Iron Company?

A. Ed. Baum.

Cross-examination.

By Mr. LAMB:

Q. He has asked you whether or not you made any preparation or provision for continuing that manufactory; is it a fact that immediately after this fire they secured an engine to run the machinery in place of that which had burned and went to work with it?

A. Yes, sir.

83 Q. They obtained a stationary engine?

A. Yes, sir.

Q. And attached it to the shafting, didn't they?
A. Yes, sir.
Q. So they could go right on and operate what machinery was left?
A. Yes, sir.
Q. And how soon was that after the fire?
A. Within 10 days or two weeks.
Q. When they had attached that to the machinery they started the machinery up and went to using it?
A. Yes, sir.
Q. How long did they continue to use that engine?
A. That particular engine about a year, I think.
Q. And did they secure some other engine?
A. Yes, sir.
Q. Then from about two weeks after the fire, so far as motive power was concerned, to operate the machinery they had motive power?
A. Yes, sir.
Q. And also the machines the roof fell down on, they cleaned the roof off, and fixed them up, and set them going?
A. Yes, sir.
Q. With regard to end gates; it didn't take any machinery to manufacture the end gates?
A. Not a great deal; no, sir.
Q. You had the castings and iron all ready for those?
A. Yes, sir.
Q. And with a hammer and hand-saw they could put these end gates together, couldn't they?
A. Yes, sir.
Q. What, if anything, was there about these end gates; what particular pieces at all, if any, was there that required any machinery after the fire, did you require any machinery to make anything that you didn't have?
A. We could have made most any of them after the fire.
Q. The corn-shellers or the others?
A. Yes, sir; we made part of them, and the wood-work we had made.
Q. You had the wood-work?
A. Yes, sir.
Q. How many frames did you have, or about how many?
A. Between 700 and 800.
Q. And the castings that were lacking, these were secured at Hedges' foundry down town?
A. Yes, sir.
Q. The patterns were not burned, were they?
84 A. Some were and some were not. Those that were burned we used the other casting, and fixed them up as a casting.
Q. About how long a time after the fire would it require Hedges or any other foundryman to furnish those which you didn't have?
A. It wouldn't take a great while.
Q. You couldn't say just how long?

A. No, sir.
Q. About?
A. We commenced in a very few days.
Q. Was the planed lumber to finish these corn-shellers burned?
A. Yes, sir.
Q. How was it with regard to the end gates?
A. It was not burned.
Q. What was there, if anything, about the end gates that was destroyed, that couldn't be readily supplied, anything?
A. No, sir.

Redirect examination.

By Mr. McIntosh:

Q. Do you mean those that were partly finished, between 700 and 800 that you could have done within 30 or 60 days if you had put force enough on?
A. Yes, sir.
Q. You got an engine to run the machine with, but you didn't get the engine to run any machinery for making the wood-work of the corn-shellers or end gates, did you?
A. No, sir.
Q. You didn't have any machinery of that kind?
A. No, sir.
Q. And when you speak of an engine to run the machinery you mean that small portion of the machinery that the roof fell on and was used for drilling holes?
A. Lathes and drills such as we have.
Q. You have no wood-working machinery at all?
A. No, sir.
Q. You have no machinery for making end gates, have you?
A. No, sir.
Q. And in order to make these end gates to fill a contract like that between the plaintiff and the defendant, you wanted more than a handsaw and a hammer?
A. That would depend upon how fast they wanted us to get them out.
Q. It depended, too, upon the price for which they were to be sold, didn't it?
A. I suppose that would have something to do with it.
85 Q. A man with a handsaw couldn't make that end gate and sell for $1.25?
A. I don't know.
Q. You have been making these end gates with a regular plant of wood-working machinery, have you not?
A. Such as was necessary; yes, sir.
Q. These end gates were never made for market simply with a handsaw and hammer?
A. I don't know.
Q. You never knew them to be?
A. No, sir.

Q. Referring to the wood-work of the corn-shellers, do you want to correct your answer there, and state you simply had the frame-work of the corn-shellers?

A. We had the frame-work of part, and part was completed except painting.

Q. After the fire you didn't have any wood-work of the shellers, uncompleted shellers, except the frame-work?

A. I think not.

Q. The lumber for the end gates was partly burned?

A. No, sir.

Q. Wasn't the end of it burned?

A. There might have been some at the end.

Q. All the wood-work that was done on these corn-shellers in completing them up, was hired, done out in the city of Lincoln, substantially all?

A. No, sir; it wasn't.

Q. The wood-work; I mean the wood-work?

A. Yes, sir; it was.

Q. And hired, done out in Lincoln, because the plaintiff had no facilities for doing it himself?

A. Yes, sir.

Recross-examination.

Mr. LAMB:

Q. He has asked you what was made out in the city of Lincoln?

A. Nothing but the trays and a few panels.

Q. It is true that you had on hand there all of the planed material for the frames for all of these corn-shellers?

A. We had the material.

Q. Raw material?

A. Yes, sir.

Q. And in your service there you are at work under direction of Mr. Welch, who is sup't of the works?

A. Yes, sir.

Witness excused.

86 J. S. DICKMAN, called as a witness on behalf of the defendant, sworn and examined by Mr. McIntosh:

Q. What is your occupation?

A. Book-keeper at the present time.

Q. Whom for?

A. The Western Manufacturing Company.

Q. How long have you been its book-keeper?

A. Since about July 1st, 1892.

Q. You may state whether or not since the fire on October 26th, 1893, the plaintiff has sold any mowing machines of the kind agreed to be ordered from the plaintiff by the defendant in the market in Kansas City?

A. They sold some mowers at Kansas City; yes, sir.

Q. What did they get in the market there for the mowers they sold of the same kind the defendant agreed to order from the plaintiff?

A. The agreed price was $22.50 for 4½-foot and $25.00 for 5-foot each f. o. b. Kansas City.

Cross-examination.

By Mr. LAMB:

Q. You don't know anything about the amount of expense of traveling about the country that was incurred in making that sale, but there was a large expense?

A. I know Mr. Welch went to Kansas City for that purpose.

Q. You know he visited other places trying to make sales?

A. Yes, sir.

Q. What was the time that sale was made?

A. I don't remember the time the agreement — made, but I know about the time the goods were shipped.

Q. About what time?

A. The first shipment was made in the spring of 1894. I don't remember the month.

Q. You also know it to be a fact that the party he sold to he gave him several years' time or a long time to pay for them in, gave them unusual time?

A. There was time given, but I don't know whether I could say it was unusual.

Q. How many machines do you know that he sold?

A. I think between 50 and 60, if I remember rightly.

Q. You can't remember the exact number?

A. No, sir.

Q. Do you remember the terms upon which these were sold?

A. I think it was November 1st.

Q. Payable November 1st?

87 A. Part of them were November 1st, 1894, and perhaps part of them payable the next year.

Q. Give your best impression of it?

A. Yes, sir.

Q. State upon what terms these machines were to be sold, whether they were to have dealer's paper or whether he was to take the paper of the men to whom he sold. He was to take the dealer's paper, was he not?

A. I think that was the conversation.

Q. Do you remember whether or not the contract provided as to how long the dealer's paper to whom the purchaser sold the goods was to run?

A. I think on those terms that I stated; November 1st, 1894, or perhaps part in 1895.

Redirect examination.

By Mr. McINTOSH:

Q. What time in 1895?

A. I think the latter part, perhaps in November, but in the fall of 1895.

Q. The purchasers paper was secured by the dealer as collateral, was it not?

A. I think the man was to sign the notes himself.

Q. And give the dealer's paper as collateral also?

A. I couldn't say as to that.

Q. What is your understanding about that?

A. I don't know.

Q. You have your books here; get your books, and tell substantially the property that was sold.

A. I will have to go down two or three blocks and get them.

Witness excused.

MARTIN KINGMAN, called as a witness, and sworn on behalf of the defendant, and examined by Mr. McIntosh, testified as follows:

Q. What relation do you bear to the defendant?

A. I am president of Kingman & Company, who made the contract with the Western Manufacturing Company.

Q. You know the plaintiff?

A. Yes, sir.

Q. How long have you known him?

A. I have known Mr. Welch 25 years, and the corporation 4 or 5 years.

Q. You may state whether or not you had any conversation with Mr. Welch as representative of the plaintiff at your office on the 22nd of November, 1893.

A. Yes, sir.

88 Q. Where was that conversation held?

A. The first conversation was had in the general office.

Q. Did that conversation bear upon the contract between the plaintiff and defendant at all?

A. No, sir.

Q. Where was the conversation held between you that bore upon the contract in controversy in this suit, if any such conversation occurred?

A. In my private office occupied by the secretary and myself.

Q. Who is the secretary?

A. G. H. Schimpff.

Q. Was he present during that conversation?

A. Yes, sir.

Q. Do you know whether or not he was attending to the conversation?

A. Yes, sir.

Q. How far was he sitting from you and Mr. Welch at the time of the conversation?

A. About 4 feet.

Q. You may state what that conversation was, in so far as it related to the contract between the plaintiff and defendant in controversy in this suit.

A. After meeting Mr. Welch in the outer office, I invited him to come into my private office, and asked him to have a seat beside my desk on a stool. I said to Mr. Welch, "What do you want, Mr. Welch," and he said, "I came here to get a settlement for the goods under the contract." I said to Mr. Welch, "We are not ready today to make a settlement for the goods under the contract, as you are not in a position to deliver the goods, and under the contract we are to settle for the goods when received; we can't settle by our notes until we receive the goods." He insisted upon our settling for the goods, stating that he was very hard up and needed the money, and could use our note, and I said, "We will not settle till we receive the goods." He persisted in demanding a settlement, and I said to him, "Welch, you are a bulldozer, and I want you to understand that we will not settle for these goods under the contract at this time." He says, "Are you going to repudiate this contract?" I says, "I will not settle for the goods, and if you want to sue us, you can do so, we are good." Mr. Welch made a remark about the end gates, and said he would drop those out, and I said to him, "You are not able to furnish any part of these machines as per your letter of October 30th, you can't deliver the corn-sheller, I have an order if you have corn-shellers which you can deliver. You wrote us you couldn't deliver them, and we had to supply the Des Moines house from other parties." I said that we will
89 probably want 5-foot mowers—"How many 5-foot mowers have you got?" He said we have very few 5-foot mowers, and he got up and said that this was unexpected to him, and sat down at Mr. Schimpff's desk, who was then checking over a statement that Mr. Welch had handed him.

Q. What was that statement?

A. It was a statement of account for goods delivered and shipped to us, amounting to some $1.400.00 or $1,500.00, and I turned around to Mr. Schimpff and said, "You settle with Welch for the goods shipped, in accordance with the contract." Mr. Welch refused the settlement. Mr. Schimpff called his attention to several items on the statement which he had no bills for, and Mr. Welch said he would send duplicate bills. Mr. Schimpff requested that he send duplicate bills, and we check them up. Mr. Schimpff also called his attention to a number of items in the statement for extras which were to be credited up to the Western Manufacturing Company, and which we were not to pay for, and he asked Mr. Welch to leave the statement with him and to send duplicate bills, and Mr. Welch stated that his statement had not been copied and he preferred to take it home with him, and to send the duplicate bills when he got home. Mr. Schimpff during the conversation referred to an overcharge on some 5-foot mower bars, stating that the charge was too much by $1.00, I think it was two bars; Mr. Welch couldn't furnish the bars at a difference of $1.00, and Mr. Schimpff called his atten-

tion to the contract, and stated that it was in accordance with the contract, and remarked to Mr. Welch that he would expect 5-foot mowers in accordance with the contract.

—. Was there anything said there and then about taking all the 5-foot mowers he had?

A. At that point I sat right at the desk of Mr. Schimpff, and I said, "Welch, we will take all the 5-foot mowers you have got in stock."

Q. What did he say to that?

A. He had remarked before, and remarked again, that he hadn't any large number of 5-foot mowers. At that juncture he took the statement from Mr. Schimpff, put it in his pocket, and said he would consult with his people at home, associates or attorney, and he would see what he could do.

Q. Did he accept payment for the goods that you had received under the contract?

A. He didn't accept payment for them at that time?

Q. Did he afterwards?

A. Yes, sir; he did accept payment afterwards.

Q. Did you in that conversation say "that it had been a poor season to sell mowers, and that you thought the best thing
90 Welch could do would be to carry these over," and did he, in answer to any such statement, tell you "that he was willing to carry them over if you would settle with them"?

Mr. Lamb objects as improper.

Sustained. Exception.

Q. Did you say to Mr. Welch there that the defendant would not take any mowers?

A. No, sir.

Q. Did he say to you at that time that he could fill your order for end gates in 10 days or two weeks?

A. No, sir.

Q. Did you say to him at that time that you didn't want any end gates and wouldn't take any mowers?

A. No, sir.

Q. Did you say to him at that time that you didn't want the shellers?

A. No, sir.

Q. I show you this letter, marked Exhibit "10," and ask you to state whether or not that is a letter received by the defendant from the plaintiff? (*Q.*) When was that received?

A. December 19th, 1895.

Mr. McIntosh: I offer Exhibit "10" in evidence.

Admitted and read as follows:

Lincoln, Nebr., *Dec.* 15, '93.

Kingman & Co., Peoria, Illinois.

Gentlemen: We acknowledge receipt of yours 12th inst., enclosing your check for $678.76, and your note due Oct. 1st, 1894, for 681.13, with 6 per cent. interest from Jan. 1st, 1894. Your enclos-

ures seems to be in accordance with the statement enclosed by you, and appear to be correct for the goods which we shipped you before you terminated the contract, except that you have not remitted us enough money. Outside of the 54 mowers charged in the account amounting to $1,242.00 net, all the remaining items are cash items, and we see no reason why we should take your note due Oct. 1st, 1894, with 6 per cent. interest, for part of the items, therefore we return your note and credit your account with your check for $678.76.

I have to admire your cunning which you exhibit in your letter in trying to avoid your contract with us. It is not true as you state in your letter that I admitted to you when at your place a short time ago, that we did not have the mowers on hand to fill your orders, and there is no admission of that character in my letter of the 6th inst.

The facts are that we have now on hand and have constantly had on hand for more than 6 months past, more than 150 com-
91 pleted mowers ready to fill your orders, and we have written to you time and again asking for shipping directions, which you never gave us, and we now notify you that unless you accept at once our proposition of compromise as stated in our letter of the 6th inst., we shall hold you for the damage we have sustained for your breach of the contract.

We will not for a moment entertain the proposition of compromise or settlement you make in your letter of the 12th inst. We will not reinstate the contract allowing you to accept or reject such portions of it as suits your convenience, regardless of the damage, and loss we may suffer, nor will we make you any further shipments under it. Awaiting your reply, we are,

Respectfully yours,

WESTERN MANUFACTURING CO.
M. D. WELCH, *Sec'y & Treas.*

Mr. McIntosh: I now offer defendant's answer as Exhibit "11" in evidence.

Admitted and read as follows:

Dec. 19, '93.

Western Manufacturing Co., Lincoln, Nebr.

Gentlemen: Yours of the 15th, returning our note for $681.13 due Oct. 1, '94, with interest at 6 per cent, from Jan. '94, is received and noted. We think you must be laboring under some mistake as to figures, and to assist you (*im*) arriving at our understanding of the matter, will state that the whole balance to your credit less repairs on hand, was $1,362.27. Now of this amount there were 54 mowers, 13 of which were 5 ft. at $26, would be $338; and 41 4½ ft. at $25, would be $1,025, making the mowers amount to $1,363, or 73 cts. more than the balance due you. Therefore it is perfectly proper to settle this balance on the basis of being due you for mowers half of which is due Jan. 1, '94, and the other half Oct. 1, '94, with interest from Jan. 1st. We therefore conclude that our figures are correct, and we herewith return to you our note for $681.13, due

Oct. 1, '94, which we ask you to accept and credit on account for goods already received.

Now referring to your letter, you say that we have terminated the contract. The writer stated to you when here that he did no- propose to be bulldozed by you, and that if you wanted to sue us for not taking (goo-s) up to this time, you could go ahead and do it, but as to terminating the contract, will say that we have for-
92 warded you two orders for car-loads of shellers, which should indicate to you that we expected you to fill them. We now understand from your letter that you will not make any further shipments under the old contract, and that you now cancel the contract, which we accept.

We will thank you to acknowledge receipt of inclosed note, and greatly oblige,

Yours truly,

KINGMAN & CO.,
By M. KINGMAN, *Pt.*

Q. I show you this letter marked Exhibit "12," and ask you to state whether or not that is a letter received by the defendant from the plaintiff?

A. Yes sir.

Mr. McINTOSH: I offer Exhibit "12" in evidence.

Admitted and read as follows:

LINCOLN, NEBR., *Dec. 27th*, 1893.

Kingman & Co., Peoria, Ill.

GENTLEMEN: Referring to yours of the 19th inst., when you sent your check and note to us to balance amount we supposed you intended to settle according to the contract, and in the manner you had made settlements for shipments heretofore. The contract states that all shipments are to be settled for on receipt of goods. If you had complied with the contract, and sent us your note on receipt of mowers, you would have deducted the freight paid, and send the note for balance.

The way you settle the account now, you settle for the gross price of the mowers. We return your note herewith, and enclose memorandum showing the way the account should be settled, if you desire to close it in accordance with the contract between us.

Yours truly,

WESTERN MANUFACTURING CO.
M. D. WELCH, *Sec'y and Treas.*

Q. I show you this paper marked Exhibit "13" and ask you to state whether or not that is the account referred to in Exhibit "12," and enclosed with it?

A. That is their letter and statement as received.

93 Mr. McINTOSH: I offer Exhibit "13" in evidence.

Admitted and read as follows:

41 4-ft. 6 mowers, 25.00	1,025	
13 5-ft. mowers, 26.00	338	
	1,363	
Less fr't, say, av. 2.00 each	108	
	1,255	
½ due Oct. 1, '94	627 50	
	627 50	
Amount of our ac.		1,468 95

CR.

Extras on hand	106 68	
Dis. on 627.50 to Jan. 1, '94	2 66	
Note due Oct. 1, '94	627 50	
Cash due	732 11	
		1,468 95

Mr. McINTOSH: I offer paper marked Exhibit "14" in evidence. Admitted and read as follows:

JAN'Y 2ND, 1894.

Western Man'f'g Co., Lincoln, Nebr.

GENTLEMEN: Your favor of the 27th was received in due time and contents carefully noted. While we do not concede the correctness of our interpretation of the contract, the question is only as to whether we owe you $58.35 more next October with 6 per cent. interest from Jan'y 1st, or whether we should pay it you now. This is about the sum and substance of the whole controversy, and to cut the matter short, we herewith send you a new note for $627.50, due Oct. 1st, 1894, and bearing interest at the rate of 6 per cent. from Jan'y 1st, 1894, and also a draft for $53.35. In your statement you say cash due, $732.11, but you do not give us credit for the amount remitted you, $678.76. We therefore deduct the $678.76 for the $732.11 cash, shown to be due, and remit to you the difference, $53.35.

Now to show you the fallacy of your argument, we will say that in the contract you agree to deliver the mowers at our several houses, therefore, to settle with you strictly on the contract, had we settled with you at the time the mowers were shipped we should 94 have made draft on you for the amount of freight which we had to pay. There is nothing to show why we should deduct the freight from a time-payment, when you agree to deliver the goods at our house. In other words, there is nothing in the contract in which we agree to loan you the money to pay the freight. We therefore would probably have been entitled to make a draft on you for the amount of the freight, and then have given two notes, one due Jan'y 1st, 1894, and the other due Oct. 1st, 1894, in settlement for the mowers. As the settlement was not made at that time, and we did not draw on you for the amount of freight paid, it was clearly our right to deduct the freight from the cash payment due you on

Jan'y 1st, but, as before stated, the matter being so trivial, we settle as you request.

Please acknowledge receipt, and oblige,

Respectfully yours, KINGMAN & COMPANY,
By G. H. SCHIMPFF, *Sec'y.*

Q. I will ask you to state whether or not the enclosures referred to in Exhibit "14," the letter last referred to, were enclosed in it.

A. I think so.

Q. And that finally settled the account?

A. Yes, sir.

Q. The order for goods that was with the plaintiff at the time of the fire (corn-shellers) was the defendant obliged to buy these goods elsewhere?

A. Yes, sir.

Q. I will ask you to state whether or not the defendant, when its orders were not filled for shellers by the plaintiff, obtained similar goods of a like kind of the orders placed with the plaintiff.

Mr. Lamb objects as incompetent, irrelevant, and immaterial, and not admissible under the issues joined.

Sustained. Exception.

Mr. McIntosh: I offer in answer to the question——

The Court: Don't state what you offer.

Mr. McIntosh: I would like to have your honor consider this rule of the court of appeals.

The Court: No, sir; I am not going to consider any rules different from the ones that obtain here already.

Mr. McIntosh: I wish the court would allow the record to show that your honor refuses.

The Court: I won't put that sort of a thing in the record.

95 Mr. McIntosh: Then your honor refuses to permit me to make the offer?

The Court: Positively.

Mr. McIntosh: Or to let the records show that you refuse to?

The Court: Yes, sir; I won't have a thing of the sort in the record until a higher court says so. You might get a mandamus and compel me to.

Q. You may state what effect it had upon your business and upon the prices that — were compelled to pay for goods—not to have your orders filled when presented to the plaintiff, and for that reason being obliged to buy in smaller quantities elsewhere?

Mr. Lamb objects as no foundation laid, and not admissible under the pleadings. Sustained. Exception.

Mr. McIntosh: I am going to offer to show again and request your honor to allow the record to show that you refused to let me.

The Court: No, sir; I won't have a word in the record on the subject.

Q. Any correction you desire to make in the answers that you have given to the questions just put to you, you may make.

A. The question you asked here concerning end gates and mowers, which I answered "No" and which I would like to divide and (*and*) answer "No" as to the mowers, and "Yes" in answer to the end gates.

Q. What is your answer then as to end gates?

A. That I said to Mr. Welch that we didn't care for the end gates, and his answer was, "We will say nothing about gates."

Q. Did you say you wouldn't take end gates?

A. No, sir.

Cross-examination.

By Mr. LAMB: I offer in evidence two letters of December 6th, 1893, as cross-examination of this witness, and which are marked Exhibit "16" and "17" and I also offer a letter of December 2nd, 1893, as Exhibit "18."

Admitted and read as follows:

LINCOLN, NEBR., *Dec. 6th*, 1893.

Kingman & Co., Peoria, Ill.

GENTLEMEN: You told the writer when at your place on the 22nd ult., that you would comply with the terms of your contract
96 with us, and take the goods ordered, but invited us to sue you for damages. As we are not desirous of having a suit with you, and in order to (*to*) avoid the expense incident to litigation, we hereby make you the following proposition, which, if accepted by you to be in full of all differences between us:

Mail us at once your check for $1,468.95, to cover what you owe us for goods you have ordered and accepted. What you owe us for mowers, shellers, and end gates which you have refused to order or accept, we propose the following:

Give us shipping directions at once for 174 mowers, part 4-6 part 5 ft. We, however to ship such sizes as we have in stock—shipment to be made at our convenience between now and June 1, 1894.

Price to be $25.00 each for 4-6 and 26.00 for 5 ft. delivered in Peoria, or to any of your branch houses.

Freight to be paid by you and deducted from invoice and each invoice to be settled by your notes due as follows:

⅓ June 1, '94.

⅓ Oct. 1, '94, with 6 per cent. int. from Jan. 1, '94.

⅓ Jan. 1, '95.

If you decide to accept the above proposition, we will release you from the contract, and cancel your order for 1,800 corn-shellers and 1,200 Climax end gates; otherwise we shall be compelled to accept your invitation to litigate the matter, but we hope you will not force us to resort to resources which would not only be disagreeable to us, but equally unpleasant to you.

Awaiting your reply, we are,

Yours truly,

WESTERN MANUFACTURING CO.
M. D. WELCH, *Sec'y and Treas.*

LINCOLN, NEBR., *Dec. 6th*, 1893.

Kingman & Co., Peoria, Ills.

GENTLEMEN: We are just in receipt of yours of the 4th. This is the only letter we have received from you since the writer was at your place. You mention having written us last week making a proposition. That letter must have gone astray, as we never received it. Please send us a duplicate of it.

Yours truly,

WESTERN MANUFACTURING COMPANY.
M. D. WELCH, *Sec'y and Treas.*

97

LINCOLN, NEBRASKA, *Dec. 2nd*, 1893.

Kingman & Co., Peoria, Ills.

GENTLEMEN: We inclose duplicate invoices covering the items on our statement of which you had no account when the writer was at your place. The original invoices were sent by request to the house that ordered the goods. After you credit these items to us your account will stand debit on our books..... $1,563 70
and the amount of your credit..... ..... 87 73

Balance our due..... ..... $1,475 97

Please inform us if this agrees with your books.

Yours truly,

WESTERN MANUFACTURING COMPANY.
M. D. WELCH, *Sec'y and Treas.*

5 enclosures.

Redirect examination.

By Mr. MCINTOSH:

Q. In that letter of December 6th, 1893, Mr. Welch says, "You terminated the contract." I will ask you to state whether or not it is true that you terminated the contract?

Mr. Lamb objects as incompetent, irrelevant, and immaterial.
Sustained. Exception.
Witness excused.

A. D. BEAMER, called as a witness on behalf of the defendants, sworn and examined by Mr. McIntosh:

Q. What official position, if any, did you hold in the State of Nebraska during the years 1893 and 1894?

A. Warden of the State (penitentiary).

Q. You know about the fire that occurred at the (penitentiary) on October 26th, 1893?

A. Yes, sir.

Q. What was the extent of that fire?

A. It damaged the buildings considerable, and the machinery. I don't know as to what extent the machinery was damaged, as I had nothing to do with it, but only in regard to the buildings. I

reported that afterwards, and I think there was some $47,000.00 or $48,000.00 loss to the State.

98 Q. What effect did that fire have upon the agricultural implement business that was carried on in the building which was burned?

A. I don't know what effect it had financially upon them.

Q. I mean upon their operation?

A. It stopped it somewhat for a time.

Q. When, if at all, were those buildings replaced?

A. Very near a year afterwards they were completed, or that building was completed.

Witness excused.

G. H. SCHIMPFF, called as a witness on behalf of the defendant, sworn and examined by Mr. McIntosh:

Q. State whether or not you were present on the 22nd of November, 1893, when a conversation occurred between Mr. Welch, representing the plaintiff, and Mr. Kingman, representing the defendant, relative to the contract in controversy in this suit?

A. Yes, sir; I was present.

Q. How long did that conversation last?

A. There was an interruption in the conversation.

Q. Just the conversation?

A. Just 15 minutes.

Q. You may state what that conversation was, and what was said and done at that meeting relative to this contract?

A. Kingman brought Welch into the private office that both of us occupy, and invited him to take a seat on the opposite side of his desk, and he says, "Now, Welch, what do you want?" And Welch said, "I want a settlement for the goods under this contract or under our contract," and Kingman replied, "Well, we will settle with you for all the goods we received, but we can't settle with you for all the other goods, because you are not able to furnish them," and Welch said, "Yes, we can," and Kingman, "No, you cannot; you admit in your letter you wrote us that your end gates were all burned up, and you haven't been able to fill this order for shellers that we gave you to ship to Des Moines," and Welch says, "Well, we can fill it anyhow;" but Kingman says, "No, you cannot." He says, "I want a settlement," and Kingman says, "Welch, you are a bulldozer, and you are trying to bulldoze us into making a settlement for some goods that you can't furnish us." And in the meantime or before that Welch had given me a statement of the account, and I had been at work checking it up, sitting at my desk right along by Kingman's desk, and Kingman offered to settle for the goods that were shipped and I called Welch's

99 attention to the statement, and told him there were several items charged in that statement that didn't appear on our books, so Welch left his seat in front of Kingman's desk, and took a smaller stool in front of my desk, and I lifted up the statement and pointed out the discrepancies to him, and he said,

"Well, you mark off on the statement, and I will take the statement back with me, and send you duplicate copies of these invoices as I want to take the statement." I says furthermore, "You charged us $2.00 for exchanging 5-foot bars and knives for 4½ bars while the contract is only $1.00," and Welch says, "I cannot afford to send you extra bars or exchange bars for $1.00, at it costs me more than that," and I says the contract says $1.00, and he says, "I can't help that. Of course if you order the mowers we will have to furnish them," and I says, "By the way, what mowers have you saved out of the fire," and he says, "Enough to fill the contract with gears for the mowers, and I have some 4½-foot bars, but very few 5-foot bars," and I says, "That is unfortunate because our demand has been nearly altogether 5-foot mowers, in fact we have to exchange some of these 4½-foot for 5-foot with you, and that is what the charge came from." I says, "What mowers we want, we will want largely 5-foot mowers," and Mr. Kingman says, "Yes, we will take what 5-foot mowers you have got," and Welch says, "I can't furnish all 5-foot mowers," and he says, "We can't use 4½-foot," and he says, "What 4½-foot we had are very nearly all on hand, and the 5-foot are gone." We talked on then, and Mr. Welch spoke again about this settlement, and Kingman says, "You can have a settlement for the goods we have had," but Welch says, "No, I don't want that, and I will go home and consult my associates and attorney," and I spoke up again, and says, "Welch, you will leave me that statement," and he says, "No, that statement hasn't been copied, and I will take that home with me, and I will send you duplicates."

Q. Did Kingman in that conversation say that they wouldn't take any mowers?

Mr. Lamb objects as immaterial.

Sustained. Exception.

Q. Did Kingman or you in that conversation say, that they didn't want any end gates and wouldn't take any mowers?

A. No, sir.

Q. Did Kingman say in that conversation that they wouldn't take any more goods from the plaintiff at all?

A. No, sir.

Q. Had the defendant in its business established a trade in any locality for what we call the Kingman mower?

A. Yes, sir.

100 Q. Where did that locality extend?

A. We had a trade in Kansas, but I can't tell you definitely how far each house sold at. I will have to qualify that answer to each of our branch houses, that is, through Kansas and St. Louis they had a large trade in these mowers.

Q. And how had it a similar trade for the Weir mower?

A. The Weir mower never had been sold to the Kansas trade under that name.

Q. That extended through the State of Kansas and parts of Missouri and Arkansas?

A. Yes, sir.

Cross-examination.

By Mr. LAMB:

Q. You have testified that this company had trade established for these mowers; where did this company have its branch houses?
A. Omaha, Des Moines, Kansas City——
Q. Sioux City?
A. No, sir, Kansas City, St. Louis, but Peoria is the main house.
Q. One at St. Joe?
A. No, sir.
Q. And these branch houses were all run by the house at Peoria?
A. Yes, sir, under its supervision.
Q. All directed by that house?
A. Yes, sir.

Witness excused.

It is admitted that the tongues for the mowing machines were obtained by the plaintiff between the 27th of April, 1894, and the 25th of June, 1894, inclusive.

Defendant rests.

M. D. WELCH recalled in rebuttal and examined by Mr. Lamb testified as follows:

Q. You have heard the testimony touching the poles for these mowers?
A. Yes, sir.
Q. State whether or not you didn't have on hand at that time, and during all that time poles for all of these mowers?
A. Yes, sir.
Q. State what this order for poles was for?
A. These poles that we had on hand I considered imperfect as they had gotten warped and twisted, and I wanted the mowers
101 completed, so I waited till the season just before the selling began, so I ordered them in the spring, and took my time to it.
Q. You have heard the testimony of the witness Dickman in regard to attempting to show that you had no machinery there with which to complete machines; state how soon after the fire you put a new engine there and set these machines going that you rescued from the fire.
A. Immediately after the fire, after the adjustment had been made—about a week or ten days—the engine was put in place in the cooper shop, and the steam was taken across the yard from the boiler under the ground to run this engine and what machinery we saved from the fire, and what castings that were not injured were taken out of the débris, and I gave orders to my man to place the machinery in the laundry, a large unoccupied room in the cooper shop, and take an inventory of the parts.
Q. State what they did.
A. We immediately began to complete these shellers, and started

in on them with some force, and when I found I was unable to sell the shellers on account of glut in the market——

Mr. McIntosh: I move to strike the answer out.
Sustained. Exception.

—. I stopped the manufacture of them only in a limited way, and only kept one or two men at work on them during the winter till next spring.

Q. You have heard the testimony here with regard to your having sold certain shellers in Kansas City; how many were sold by the company there?

A. I think I sold 50.

Q. Is that the extent of the sale of shellers by you?

A. No, sir; I sold 200 some time ago in St. Louis.

Q. This year?

A. Yes, sir; last fall.

Q. Now you may state what was the expense of making the sale in 1894 of shellers; what did it cost where you had no agents in the market to go out and place them?

Mr. McIntosh: I object to the question as being too remote.
Sustained. Exception.

Q. In that letter of December 4th they claimed to have sent you a letter containing a proposition of settlement; did you ever receive any such?

A. No, sir.

Q. You wrote that you had not received it and you wrote them to forward you that letter; did they ever forward that letter?

A. No, sir.

102 Witness excused.

The foregoing being all the testimony offered by either party, the court was thereupon duly requested by defendant to give the jury the following instruction:

"1. The jury are instructed that under the pleadings and evidence in this case the plaintiff cannot recover, and you are therefore directed to return a verdict for the defendant;" but the court refused to do so, to which refusal the defendant there and then duly excepted.

And the defendant there and then further requested the court to give the following instruction:

"3. The jury are instructed to return a verdict for the defendant on the plaintiff's alleged second cause of action;" but the court refused to do so, to which refusal the defendant there and then duly excepted.

And the defendant there and then duly requested the court to give the following instruction:

"4. The jury are instructed to return a verdict for the defendant on the plaintiff's alleged third cause of action;" but the court refused to do so, to which refusal the defendant there and then duly excepted.

And the defendant there and then duly requested the court to give the following instruction:

"5. The jury are instructed to return a verdict for the defendant on the plaintiff's alleged fourth cause of action;" but the court refused to do so, to which refusal the defendant there and then duly excepted.

And the defendant there and then duly requested the court to give the following instruction:

"8. You are further instructed that the contract which forms the subject-matter of the plaintiff's second, third, and fourth causes of action is what is called in law 'entire,' and the plaintiff, if it is damaged by a breach thereof, cannot split said damage up into three causes of action, but can have but one, and one cause of action only; you are instructed, therefore, that the plaintiff, having undertaken to split said alleged breach of contract up into three causes of action, cannot recover upon any of them and your verdict should be for the defendant;" but the court refused to do so, to which refusal the defendant there and then duly excepted.

And the defendants there and then duly requested the court to give the following instruction:

103 "9. You are further instructed that the contract which forms the subject-matter of the plaintiff's second, third, and fourth causes of action is entire, for a breach of which there could be but one cause of action. You are therefore instructed at any and all events to return a verdict for the defendant on two of the three alleged causes of action called second, third, and fourth causes of action in the plaintiff's amended petition." But the court refused to do so, to which refusal the defendant there and then duly excepted.

And the defendant there and then duly requested the court to give the following instruction:

"10. The jury are further instructed that as to the mowers referred to in the plaintiff's alleged second cause of action, the plaintiff avers that it tendered said mowers to the defendant. The plaintiff is bound, by this averment, and therefore cannot sue the defendant for damages for not taking said mowers, but having alleged that it tendered the same, said mowers in so far as the plaintiff was concerned, thereby became the property of the defendant, and your verdict should be for the defendant, in so far as it relates to the plaintiff's alleged second cause of action;" but the court refused to do so, to which refusal the defendant there and then duly excepted.

And the defendant there and then duly requested the court to give the following instruction:

"12. You are further instructed that if you find from the evidence that each of the parties to the contract referred to in the plaintiff's second, third, and fourth causes of action, indicated in an oral conversation between the agents of the plaintiff and the defendant at Peoria, in November, 1893, a willingness to perform said contract, then neither party thereto could put the other in default of a performance thereof without first making upon the other a demand of performance, giving a reasonable time within which to perform, and

giving notice that a failure to comply with said demand within a reasonable time after it was made, would be deemed a forfeiture of said contract, and if you find from the evidence that the plaintiff refused to furnish goods under said contract, without making such demand, and giving such notice, then the plaintiff cannot recover for a breach thereof, and your verdict as to the plaintiff's second, third, and fourth causes of action should be for the defendant." But the court refused to do so, to which refusal the defendant there and then duly excepted.

And the defendant there and then duly requested the court to give the following instruction:

104 "19. If you find from the evidence that a fire occurred on or about the 26th day of October, 1893, in the shops of the plaintiff which incapacitated it from furnishing to the defendant all of the different kinds of goods described in the contract referred to in the second, third, and fourth causes of action in manner and form as in said contract agreed, then your verdict as to said second, third, and fourth causes of action should be for the defendant; for as I have before told you, the plaintiff cannot recover without proving first to your satisfaction that it had the ability on its part to perform said contract, and if you find from the evidence that it had not such ability, then your verdict should be for the defendant, and its makes no difference that the plaintiff's inability to perform the contract was due to the destruction of its manufacturing plant by fire;" but the court refused to do so, to which refusal the defendant there and then duly excepted.

And the defendant there and then duly requested the court to give the following instruction:

"22. You are further instructed that if you find from the evidence that the defendant ordered from the plaintiff a part of the goods agreed in the written contract between them to be ordered, and in pursuance of such orders, the plaintiff delivered to the defendant a part of the goods described therein, and that on or about the second day of January, 1894, a settlement was duly made between the plaintiff and the defendant under and in pursuance of the terms of said contract, by which the defendant paid to the plaintiff the balance due it under said contract for the goods so delivered by the plaintiff to the defendant and unsettled for, then your verdict should be for the defendant as to the plaintiff's second, third, and fourth causes of action." But the court refused to do so, to which refusal the defendant then and there duly excepted.

And the defendant there and then duly requested the court to give the following instruction:

"23. The jury are further instructed that if you find from the evidence that after the acts and conversations which the plaintiff claims constituted a breach of said contract on the defendant's part, the plaintiff and the defendant made a settlement with each other, according to the terms of said contract, and under and in pursuance of it, for the goods that had been delivered to the defendant under said contract, such settlement would constitute a waiver of any damages which the plaintiff might have sustained by reason of any

breach of said contract prior to said settlement; for the plaintiff could not treat said contract as existing for the purpose of
105 settling with the defendant for the balance due the plaintiff, but broken for the purpose of recovering damages from the defendant, and in that event your verdict as to the plaintiff's second, third, and fourth causes of action should be for the defendant;" but the court refused to do so; to which refusal the defendant there and then duly excepted.

And the defendant there and then duly requested the court to give the following instruction:

"25. The jury are further instructed that even if you should find from the evidence in this case considered by you in the light of the instructions of the court that the plaintiff was entitled to recover on its second, third, and fourth causes of action or any one or more of them, still the plaintiff cannot recover from the defendant more than nominal damages; for where there is a breach of a contract for the failure to order articles agreed to be ordered at a specific price, and which are to be manufactured, the measure of damages for a breach of such a contract is the profits that the plaintiff would have made by the manufacture and sale of such articles according to the terms of the contract, after making a reasonable allowance for less time employed and for release from the care, trouble, risk, and responsibility attending a full execution of the contract. There is nothing in the pleadings in this case nor in the evidence from which you could find what plaintiff's damages, if any, were, when measured by the rule given you in this instruction. Hence, even although you should find for the plaintiff on said second, third, and fourth causes of action or any one or more of them, you can only award it nominal damages, by which is meant some small sum, such as five cents." But the court refused to do so; to which refusal the defendant there and then duly excepted.

And the defendant there and then duly requested the court to give the following instruction:

"26. You are further instructed that there is no evidence given by the plaintiff of the market value of the goods described in the contract of May 9th, 1893, between the parties to this suit at Peoria, St. Louis, Kansas City, Des Moines, or Sioux City. The goods described in the contract between these parties were to be delivered to the defendant at any one of the above-named places, or at Omaha. The plaintiff therefore having failed to furnish any evidence of the market value of said goods at the above-named places has failed to furnish evidence by which you can reach a verdict for
106 any substantial sum in its favor, and therefore you are instructed that in no event can you return a verdict for the plaintiff for more than a mere nominal sum, such as five cents." But the court refused to do so; to which refusal the defendant there and then duly excepted.

And the court thereupon, among other things, gave the following instructions to the jury:

"The measure of damages would be, if the plaintiff is entitled to recover at all, *would be* the difference between what the defend-

ant agreed to pay for the machines when ordered, and the general market price of the machines when the plaintiff might have them on hand at the time they ought to have been delivered, and at the time it is claimed the defendant refused to receive the same;" to which instruction the defendant there and then (*then*) duly excepted.

The court further instructed the jury, among other things, as follows:

"So if you find the plaintiff is entitled to recover any sum whatever for his damages sustained, you should ascertain the contract price, which you can readily do, from an inspection of the contract itself, and then you will have to determine from the testimony, as well as you can, what was the real market value of the machines in the country at the times and places when the same were to be delivered by the plaintiff on the orders that were to be made by the defendant that is provided in the contract;" to the giving of which instruction the defendant there and then duly excepted.

The charge of the court as a whole was as follows:

"GENTLEMEN OF THE JURY:

Brother McIntosh has asked me to give you twenty-two or twenty-three written instructions, and if I could do that I think we would exhaust the subject before we would get half way through; and I do not propose to give all that are asked, but part of the same will be given, and so far as the plaintiff's side of the controversy is concerned, it may be that that half of the instructions that will be given on behalf of the defendant will effectually dispose of the controversy. Of course that will be for you to determine, and it will depend on the testimony that has been before you and the arguments, and more specially since the arguments are concluded.

The suit is based on a written contract that was made between the parties; there is no dispute whatever about the contract,
107 except so far perhaps as to the contents, and there is very little dispute, if any, with reference to that. The contract has been executed between the parties as claimed in the pleadings, and the answer of the defendant virtually admits that the copy of the contract that was attached to the plaintiff's petition is substantially correct. One of the numerous originals has been presented here, and it is admitted that that is the contract on which the suit is based.

It is alleged in the plaintiff's petition that a breach of the contract occurred on the part of the defendant in failing to perform the terms of the contract itself, and according to its terms. And that will be for the jury to determine whether there has been a breach of the contract on the part of the defendant, and whether or not the plaintiff consented to the breach and in any way terminated the contract between the parties themselves. It is not claimed that the defendant has complied with the contract; indeed it is claimed that he did not comply with the contract according to its terms, but he offers several excuses for failing to comply with the contract according to its terms, and unless some of these excuses are valid and

binding on the plaintiff, then the defendant would have to respond in damages for whatever amount of damages the plaintiff has sustained by reason of the non-performance of the contract on the part of the defendant. So, after all, there is nothing in reality between the parties but a question of fact or questions of fact, and so far as the law is concerned it is perfectly plain and clear, as I think, and there is no controverted point of law about the case as it presents itself to me.

You will see from an examination of the contract that the defendant bound itself to order from the plaintiff manufacturing concern certain sorts of agricultural implements described therein. These machines are mowers, corn-shellers, and an end gate to a wagon that is used for the more convenient unloading of corn or other grain that may be hauled in the wagon on a farm. The prices of each is there stated, so there can be no mistake about that. The simple question then is, did the defendant fail to make the orders to the plaintiff for the machines in question without a sufficient excuse for not doing so? If he did, then of course, the plaintiff is entitled to recover the damages they have sustained by the non-performance of the contract.

Now, as I have stated, on two or three occasions, in my judgment, the measure of damages would be, if the plaintiff is entitled to recover at all, *would be* the difference between what the defendant agreed to pay for the machines when ordered and the gen-
108 eral market price of the machine when the plaintiff might have them on hand at the time they ought to have been delivered, and at the time it is claimed the defendant refused to receive the same. So, if you find the plaintiff is entitled to recover any sum whatever for his damages (sustained), you ascertain the contract price, which you can readily do from an inspection of the contract itself, and then will have to determine from the testimony as well as you can, what was the real market value of the machines in the country at the times and places when the same were to be delivered by the plaintiff on the orders that were to be made by the defendant that is provided for in that contract. There the question must of necessity come, and where it must of necessity land the rights of the parties. If the defendant cannot be excused from giving orders, unless the plaintiff had done something in declining to make orders or receive machines then he is absolutely bound by whatever damages the plaintiff sustains by reason of the non-performance of the contract.

Brother McIntosh, I shall decline to give all of your instructions down to No. 11, and there I commence in good earnest.

I want to say to both sides while I think of it that if you want to take exceptions to these you can except to the ones that are given on behalf of the defendant, and the other side can except to the refusal to give the others.

Instruction No. 11. " You are further instructed that if you find from the evidence that both of the parties to this suit treated the contract which forms the subject-matter of the plaintiff's second, third and fourth alleged causes of action, as still in force down to

the time of the oral conversation between the plaintiff's agent Mr. Welch, and the defendant's agent, Mr. Kingman at Peoria on or about the 22nd day of November, 1893, then it will be proper for you to consider such a contract as in full force down to that time."

I want to say perhaps with reference to this petition which makes the plaintiff's claims, that what is known among lawyers as the first count in the petition is out of the way, and it is unnecessary to consider that at all because the plaintiff asked and obtained leave to withdraw that from the consideration of the court and jury and so far as that is concerned, we utterly ignore anything that has been said or done with reference to it. It is in regard to the defendant refusing to carry out the contract in refusing to introduce the machines in several States, and where it had failed to do that
109 by which and in consequence of which the trade of the plaintiff it was said was absolutely ruined in that section of the country. Suit was brought for that and damages were claimed for what the defendant refused to do as the plaintiff claimed, but that is withdrawn from the consideration of the court and jury, so you are to pay no attention to it. There are three counts remaining in the petition. One charges the defendant with refusing to make orders for the mowers in question; the other charges the defendant with refusing to make orders for the corn-shellers, and the other charges the defendant with refusing to make orders for the end gates in question. So all of those several questions we have to dispose of in the manner in which they are stated in the petition itself.

Instruction No. 13. "You are further instructed that a refusal to perform a contract may be retracted, if such retraction is made before the refusal to perform is accepted by the other party as a termination or breach of the contract. If, therefore, you should find from the evidence that in the oral conversation between the agent of the plaintiff and the agent of the defendant at Peoria, on November 22nd, 1893, the defendant refused to perform the contract referred to in the plaintiff's second, third, and fourth causes of action, but that the plaintiff did not there and then accept said refusal as a termination or breach of said contract, but that before any action in regard thereto by the plaintiff, the defendant retracted its refusal to perform and thereafter stood ready and willing and able to perform such contract until the plaintiff declared to the defendant its intention not to furnish any more goods under said contract—if you find that the plaintiff did so declare—then your verdict as to the plaintiff's second, third, and fourth causes of action should be for the defendant."

Now with reference to that I ought to add this to what is there stated—that is, if when Kingman and Welch met at Peoria, for the purpose of discussing the matters between them, if Kingman, representing the defendant, declared at that time that he would take no more goods whatever under the contract; that it was abrogated, and at an end, that Kingman on behalf of the defendant might retract that he might think that his talk and conversation and his repudiation of the contract was ill advised—he would have a right to change his mind about that in a reasonable time, and if

he did change his mind and propose to carry out the contract in good faith, it would be his duty after that to notify the plaintiff that he stood ready and willing to carry out the contract according to its terms, and if that was done, then the defendant would
110 stand in a proper position. He could repudiate what he had before said and done with reference to the overturning of the contract, and if he gave due and timely notice to the plaintiff that he had so repudiated what he said and did before, he would have a right to do that, unless the plaintiff had in the meantime accepted the repudiation of the contract or done something to his injury in consequence of the defendant having repudiated it himself. Of course, it will be for the jury to determine under the evidence what the facts are with reference to that. You may be satisfied with regard to the defendant Kingman that he never said or did what the plaintiff claims he did. It is for the plaintiff to satisfy you that was done, if it was done at all, before you will be called on to give it any construction whatever, because, unless the defendant did repudiate the contract, and did what he could to overturn it, then it would remain in full force and effect until the plaintiff himself was prepared to terminate it.

Instruction No. 14. "You are further instructed that even although you should find from the evidence that at the time of the oral conversation between the plaintiff's agent and the defendant's agent in Peoria, in November, 1893, the plaintiff was then ready and willing and able to perform the whole of its written contract with the defendant, and that the defendant there and then refused to perform the same; nevertheless, if you further find that the plaintiff did not then accept said refusal as a breach or termination of such contract, but took time to consider the same, and before any action on the plaintiff's part with regard thereto, the defendant gave to the plaintiff additional orders for goods, the giving of such orders would be some evidence of a retraction of its refusal to perform; if such retraction was made before the defendant's failure or refusal to perform was accepted by the plaintiff as a termination or breach of said contract, then said contract would thereby be fully restored and continue in full force and effect, the same as if said refusal to perform had never occurred."

Instruction No. 15. "You are further instructed that the plaintiff cannot recover unless it satisfies you from the evidence that the plaintiff was, at the time of the alleged breach of the contract by the defendant ready, willing, and able to perform said contract on its part, and if it fails so to satisfy you, your verdict should be for the defendant."

Now, with reference to that instruction, I desire to say this: The testimony seems to show that the plaintiff was doing a
111 general manufacturing business; that it was manufacturing the machines described in this written agreement, and that while the manufacturing process was going on, and before all of the orders called for by the contract was made and given by the defendant, a portion of the machinery was destroyed by fire at the (penaitentiary) in this State. But if that be so, it does not neces-

sarily follow that the plaintiff was not in a position to furnish all of the machines or all of the implements described in this contract, because if the plaintiff was either constructing them with its own machinery, and every portion and particle of the machinery had been destroyed by fire, if the plaintiff could procure machines from other places, or from other workmen, or other manufacturers, he would have a perfect right to do that in order to fulfill the contract he had made, notwithstanding every portion and particle of his machinery may have been destroyed by fire. There is some testimony that shows or tends to show that he had a large number of machines on hand that were unfinished, and upon which some work may have been necessary to paint them or put them together or furnish some parts that were missing, and the plaintiff would have a perfect right to go to machinists who dealt in the business or others who were dealing in agricultural implements and purchase or procure whatever machinery or parts of the machinery necessary to perfect the machines described in the agreement, and so far as the merits of the case are concerned, it would be wholly unnecessary for the plaintiff to be in a position to manufacture at his own plant any portion of the machinery described in that contract. The simple question would be whether he was in a position to furnish it on the demand of the defendant when the orders were made. If he could neither furnish it or make it himself, or procure it in any other place, then it seems to me he would not be injured in any extent for the defendant failing to make the orders in question.

Instruction No. 16. "The jury are further instructed that the plaintiff cannot in any event insist upon damages for the non-performance of its contract with the defendant, referred to in the plaintiff's second, third, and fourth causes of action, without first proving by a fair preponderance of the evidence that the plaintiff was, at the time of the alleged breach thereof by the defendant, ready and willing and able to perform said contract on its part, and that at the time of said alleged breach it offered to perform said contract on its part, and had the present ability to make good its offer to perform, if accepted. If you find from the evidence that the plaintiff
112 for any reason was not able at the time of the alleged breach of said contract by the defendant to perform said contract on its part, then the plaintiff cannot recover in this action on either its second, third, or fourth causes of action, and your verdict should be for the defendant in each of said causes of action."

Instruction No. 16½. "You are further instructed that if you find from the evidence that the plaintiff in a conversation with the defendant on the 22nd day of November, 1893, at Peoria, requested the defendant to settle with it for goods agreed in the contract of May 8th, 1893, to be ordered, and that the defendant there and then refused to make such settlement, except for goods it had received, the defendant had a perfect right to make such refusal, and if you find it made such a refusal, that fact should in no way be considered by you in reaching a verdict in this case, because the defendant did not agree to, and therefore it was under no obligation to, settle for goods described in the contract until after it had received

the same, and for that reason it had a perfect right to refuse to settle for goods which it had not received."

In looking over the contract you will see exactly what the terms of payment were; as I now remember, the goods were to be paid in cash or note, as the case may be at the time of the receipt of the same, and not any faster. Then they were delivered by the plaintiff on the orders of the defendant, so, if the plaintiff went to Peoria and made a demand on the defendant that he should settle for all the machinery covered by the contract, he made a demand that he had no right to have enforced, because it would be purely optional on the part of the defendant whether he should comply with the demand or not, and if he paid for the goods just as fast as re received them, then he did all he agreed to under the contract, except perhaps as to the ordering of the goods in question.

Instruction No. 17. "The plaintiff claims that in an oral conversation between the plaintiff's agent, Mr. Welch, and the defendant's agent, Mr. Kingman, at Peoria, on the 22nd day of November, 1893, the defendant said that it did not propose to carry out said contract and invited the plaintiff to sue it. You are instructed that even although you should find this to be a fact, nevertheless, if you further find that at the time of said conversation the plaintiff was not able to perform said contract on its part, in manner and form as it had agreed to do, either on account of the destruction of its manufacturing plant by fire or otherwise, then your verdict, as to
113 the plaintiff's second, third and fourth causes of action, should be for the defendant, for the defendant had a perfect right to refuse to perform such contract, if it was a fact that the plaintiff on its part was not able to perform."

Of course that question of ability to perform the contract is a question of fact for the jury to determine.

Instruction No. 18. "If you find from the evidence that on or about the 26th day of October, 1893, a fire occurred in the building where the plaintiff manufactured the mowing machines, corn-shellers and end gates described in the contract, referred to in its second, third and fourth causes of action, by which fire the plaintiff's machinery for making said implements was destroyed, and that the plaintiff was thereby incapacitated from furnishing to the defendant all of the mowing machines, corn-shellers, and end gates described in said contract within a reasonable time after orders for the same might be given by the plaintiff and not later—."

I want you to bear in mind the phrasing of that instruction because it is not mine.

"—— within a reasonable time as to said end gates after the first day of December, 1893, and as to said corn-shellers after the 8th day of May, 1894, then your verdict as to the plaintiff's second third and fourth causes of action should be for the defendant; for under the contract referred to in said second, third and fourth causes of action, it was the plaintiff's duty to furnish to the defendant the whole number of each of the different kinds of implements referred to in said contract, and if the plaintiff was not able to furnish all of said end gates before or within a reasonable time after December

1st, 1893, the defendant was not bound to take any of the goods described in said contract, but might refuse to do so, or if the plaintiff was not able to furnish all of said corn-shellers before or within a reasonable time after May 8th, 1894, the defendant was not bound to take any of the goods described in said contract."

It seems plainly enough to me, although it may not be to you, that that has special reference to the plaintiff being incapacitated from furnishing the machines described in the contract. Now, as I have stated before, if he had the capacity of doing it by his own machines or furnishing it from other manufactories or machinists he had a perfect right to do that in order to fill his contract. With that little exception, I think that is all right.

114 Instruction No. 20. "You are further instructed that neither of said parties to said suit could terminate said contract referred to in the plaintiff's second, third and fourth causes of action before its full performance, without the consent of the other parties, so long as such other party held itself in readiness, willingness and had the ability to perform."

That applies to one party as well as the other.

"—— and if you find from the evidence that the defendant was ready and willing and able to perform said contract and in response to the defendant's order for goods and while said contract was still in force, the plaintiff notified the defendant that it would not furnish any more goods under said contract, then the plaintiff cannot recover for a breach of said contract, and your verdict should be for the defendant on the plaintiff's second, third and fourth causes of action."

Instruction No. 21. "If you find from the evidence that while said contract referred to in the plaintiff's second, third and fourth causes of action still existed, and by a letter dated the 15th day of December, 1893, from the plaintiff to the defendant, the plaintiff said to the defendant that the plaintiff would not make any further shipments to the defendant under said contract, and that in answer to said letter, the defendant wrote to the plaintiff that it understood from the plaintiff's said letter, that the plaintiff would make no further shipments under said contract and that the defendant accepted said refusal as a cancellation of said contract you are instructed that said letters would constitute a mutual re-cis-ion of said contract, and neither party could maintain an action against the other for a breach thereof, and in that event, your verdict, as to the plaintiff's second, third and fourth causes of action should be for the defendant."

That is, if there was a mutual re-cis-ion of the contract on both sides, as a matter of fact, neither party could recover under the contract thereafter, because if they both agreed to terminate it they both had a right to do that, and if the agreement was mutual, neither of these parties could maintain an action after that.

Instruction No. 24. "The jury are further instructed that the plaintiff could not refuse to furnish the defendant goods under said written contract, and then claim damages from the defendant because the defendant did not take them, and if you find from the

115 evidence that when the defendant ordered goods from the plaintiff under said written contract, the plaintiff refused to

furnish them, your verdict on the plaintiff's second, third and fourth causes of action, should be for the defendant."

Of course that is correct, I think, as a general proposition, but may not fully apply to all the facts as they have been detailed in the testimony before you for your consideration, and that will be for you to determine. That statement is correct as a general proposition.

There is one matter which I think I ought to call the attention of the jury to, and that is, with reference to the shipment that was ordered as I now remember that was to be sent to Des Moines, in the State of Iowa. That was an order for corn-shellers, with fan attachment. Now, if the defendant made the order as claimed by the defendant, and the plaintiff couldn't furnish it, I am unable to see in what particular or for what reason the plaintiff would be entitled to recover any damages for the number of machines represented in that order, because down to that time there was no claim as I now recollect, of a violation of the contract or repudiation of any part of it on the part of either party, either plaintiff or defendant. Of course I can say nothing about whether the corn-shellers would constitute a car-load, but if such order as that was made, and the plaintiff could not supply them, then there is no reason why he should recover damages on that amount of machines because if he wanted to comply with the contract he should have supplied (them) according to the terms of the contract, and the probability is, that if he had done that he would have got his pay for them, and if he didn't have them ready to deliver, then he couldn't be damaged because of the refusal to deliver them, and therefore he couldn't recover damages for the car-load or whatever it was ordered in the Des Moines bill. It is not claimed that they were furnished the defendant any time thereafter, so I think, under no circumstances would the jury be justified under this testimony in awarding any damages to the plaintiff for the machines that were covered by that order.

Of course there is no time stated in this contract—there is nothing stated in the contract about what particular time the plaintiff would be required to furnish these machines, so I think that under the circumstances and giving it a proper and common sense instruction, they would be entitled to the time stated there, and the defendant would be entitled to all of the time stated there in which to make its orders. If that was done, either party would be justified unless there was something about the conditions of trade that otherwise required it. Of course, you can ascertain from the
116 testimony perhaps the conditions of business, the conditions of the trade, the customs of the manufacturers in making and furnishing orders, and all that sort of thing, and everything connected therewith, and you can tell from that what was the custom, what the parties had in view at the time of the dealings between them, and at the time of the making of this particular contract the parties were bound by.

It looks to me under this contract as though the defendant would have all the time stated there in which to give his orders for mowing machines, and the first of January following for the corn-shellers,

and December on the end gates. Whatever the date may be, of course the defendant would have a right to make his orders within that time, and the plaintiff who was furnishing the machines would have a reasonable time within which to fill the orders made upon him for the machines in question.

The foregoing is all of the charge given by the court to the jury, and after the same was given, the defendant publicly, and before the jury retired, made its exceptions thereto, particularly to the instructions relating to the measure of damages, and to the refusal of the court to give the instructions requested by the defendant, and refused, and after the defendant had specifically made all his exceptions to the instructions of the court as above stated, and to the refusal to give instructions as above stated, the jury retired to consider their verdict.

And forasmuch as the said exceptions do not appear upon the record, the defendant prays the court to sign and seal this bill of exceptions in that behalf, which is done, in all respects, and in every particular.

When the paragraphs in the charge are excepted to as appears before herein, the general charge is to be taken as correct, and when the said exceptions show a difference between the same, and the general charge, the later is correct, and must prevail.

11 Jan., 1896.

ELMER S. DUNBY, *Judge.*

Upon the back of said bill of exceptions appear endorsements in in the words and figures following, to wit:

226. Q. In the U. S. circuit court, district of Neb. Western Manufacturing Company, plaintiff, *vs.* Kingman & Company, defendants. Bill of exceptions. Dec. 30, 1895. Returned without amendment. Lamb & Adams, pl'ff att'ys. Filed Jan. 11, 1896. Elmer D. Frank, clerk.

* * * * * * *

117 Thereupon afterwards, to wit, on the 20th day of January, 1896, an assignment of errors was filed in said case; which said assignment of errors is in the words and figures following, to wit:

Assignment of Errors.

In the Circuit Court of the United States for the District of Nebraska.

THE WESTERN MANUFACTURING COMPANY, Plaintiff,
vs.
KINGMAN & COMPANY, Defendant.

Now comes Kingman & Company, defendant herein, and says that there is manifest error in the record and proceedings in the above-entitled cause in this, to wit:

First. That the court erred in admitting the following testimony of M. D. Welch on direct examination: Q. You may state in your opinion what these (mowers) were worth? A. My opinion is they

wouldn't be worth to exceed $12.50 apiece. Defendant's exception is at page 20 of the Stenographer's Minutes.

Second. That the court erred in admitting the following testimony of M. D. Welch upon direct examination, to wit: Q. What were corn-shellers worth? A. From $2.00 to $2.50. Defendant's exception is at page 21 of Sten. Min.

Third. That the court erred in admitting the following testimony of M. D. Welch upon direct examination: Q. And the end gates. (What were they worth?) A. From 75c. to 80c. Defendant's exception is at page 21 of Sten. Min.

Fourth. That the court erred in admitting the following testimony of M. D. Welch upon direct examination: Q. State about what deterioration, if any, there is on this class of machines, or these several classes of machinery, where held or carried over? A. About 10 per cent. or more; all owing to how well they are stored and taken care of. Defendant's exception is at page 22 of the Sten. Min.

Fifth. That the court erred in admitting the following testimony of M. D. Welch upon direct examination: Q. And about what is the storage on them worth per annum? What per cent.? A. There is a regular schedule for a storage of such goods by parties who have warehouses. I think 25c. on a corn-sheller, $1.00 on a mower, and 10c. to 15c. on an end gate. Defendant's exception is at page 22 of Sten. Min.

118 Sixth. That the court erred in excluding the testimony of M. D. Welch, on cross-examination, by which it was sought to show the interest of the said Welch in the event of the suit, to wit: Q. You are a stockholder of the plaintiff? A. Yes, sir. Q. What is the capital stock of the plaintiff? Mr. McIntosh: I wish to show the interest of the witness in the event of the suit. Mr. Lamb: The plaintiff objects as immaterial and as improper cross-examination. Sustained. Exception. Defendant's exception is at page 23 of Sten. Min.

Seventh. That the court erred in refusing to permit the defendant to make his offer of proof in response to the following question, the answer to which was rejected by the court, to wit: Q. Do you reiterate the statement of your attorneys that they were mowers perfect in all respects and of the highest grade? Defendant's exception is at page 25 of Sten. Min.

Eighth. That the court erred in excluding the answer of M. D. Welch, on cross-examination, to the following question: Do you reiterate the statement of your attorneys that they were mowers perfect in all respects and of the highest grade? Defendant's exception is at page 25 (*or*) Sten. Min.

Ninth. The court erred in refusing to permit the defendant to make upon the record his offer of evidence in response to the following question on cross-examination of M. D. Welch, which was excluded, to wit: Q. And the corn-shellers were equally as good as corn-shellers are generally? Defendant's exception is at page 26 of Sten. Min.

Tenth. That the court erred in excluding the answer to the following question put by defendant on cross-examination to the

plaintiff's witness, M. D. Welch, to wit: Q. And the corn-shellers were equally as good as corn-shellers were generally? Defendant's exception is at page 26 of Sten. Min.

Eleventh. That the court erred in excluding the answer on cross-examination of the plaintiff's witness, John C. Fetzer, to the following question: Q. What were shellers worth that were capable of doing good work and stood in active competition with all other shellers that did good work, in the market, in the fall of 1893? Defendant's exception is at page 77 of Sten. Min.

Twelfth. That the court erred in excluding the answer of the defendant's witness, G. H. Schimpff, to the following question: Did Kingman in that conversation say that they wouldn't take
119 any mowers? Defendant's exception is at page 113 of Sten. Min. The conversation referred to having occurred between the plaintiff's witness Welch and the defendant's witness Kingman on November 22nd, 1893, and which the plaintiff's witness Welch purported to give (Sten. Min., page 14), and which occurred in the presence of the witness Schimpff (Sten. Min., page 111), the plaintiff's witness Welch having testified that Mr. Kingman in said conversation said he wouldn't take any mowers—wouldn't take any mowers at all. Sten. Min., page 14.

Thirteenth. That the court erred in refusing defendant's fifth request to charge the jury as follows:

"5. The jury are instructed to return a verdict for the defendant on the plaintiff's alleged fourth cause of action." The request, refusal and exception of defendant are at page 118 of Sten. Min.

Fourteenth. The court erred in refusing defendant's eighth request to charge the jury as follows:

"8. You are further instructed that the contract which forms the subject-matter of the plaintiff's second, third, and fourth causes of action is what is called in law 'entire,' and the plaintiff, if it is damaged by a breach thereof, cannot split said damage up into three causes of action, but can have but one, and one cause of action only; you are instructed, therefore, that the plaintiff, having undertaken to split said alleged breach of contract up into three causes of action, cannot recover upon any of them, and your verdict should be for the defendant." The request, refusal and exception of defendant are at page 119 of Sten. Min.

Fifteenth. The court erred in refusing the defendant's ninth request to charge the jury as follows:

"9. You are further instructed that the contract which forms the subject-matter of the plaintiff's second, third, and fourth causes of action is entire, for a breach of which there could be but one cause of action. You are therefore instructed at any and all events to return a verdict for the defendant on two of the three alleged causes of action called second, third, and fourth causes of action in the plaintiff's amended petition." The request, refusal and exception are at page 119 of Sten. Min.

Sixteenth. The court erred in refusing the defendant's tenth request to charge the jury as follows: "10. The jury are further instructed that as to the mowers referred to in the plaintiff's alleged

second cause of action, the plaintiff avers that it tendered said
120 mowers to the defendant. The plaintiff is bound, by this averment, and therefore cannot sue the defendant for damages for not taking said mowers, but having alleged that it tendered the same, said mowers in so far as the plaintiff was concerned, thereby became the property of the defendant, and your verdict should be for the defendant, in so far as it relates to the plaintiff's alleged second cause of action." The request, refusal and exception are at page 120 of Sten. Min.

Seventeenth. The court erred in refusing to give the defendant's twelfth request to the jury as follows: "12. You are further instructed that if you find from the evidence that each of the parties to the contract referred to in the plaintiff's second, third, and fourth causes of action, indicated in an oral conversation between the agents of the plaintiff and the defendant at Peoria, in November, 1893, a willingness to perform said contract, then neither party thereto could put the other in default of a performance thereof without first making upon the other a demand of performance, giving a reasonable time within which to perform, and giving notice that a failure to comply with said demand within a reasonable time after it was made, would be deemed a forfeiture of said contract, and if you find from the evidence that the plaintiff refused to furnish goods under said contract, without making such demand, and giving such notice, then the plaintiff cannot recover for a breach thereof, and your verdict as to the plaintiff's second, third, and fourth causes of action should be for the defendant." The request, refusal and exception are at page 120 *et seq.* of Sten. Min.

Eighteenth. The court erred in refusing to give the defendant's nineteenth request to charge the jury as follows: "19. If you find from the evidence that a fire occurred on or about the 26th day of October, 1893, in the shops of the plaintiff which incapacitated it from furnishing to the defendant all of the different kinds of goods described in the contract referred to in the second, third, and fourth causes of action in manner and form as in said contract agreed, then your verdict as to said second, third, and fourth causes of action should be for the defendant; for as I have before told you, the plaintiff cannot recover without proving first to your satisfaction that it had the ability on its part to perform said contract, and if you find from the evidence that it had not such (abilit*u*), then your verdict should be for the defendant, and its makes no difference that the plaintiff's inability to perform the contract was due to the destruction of its manufacturing plant by fire." The request, refusal and exception are at page 121 of Sten. Min.

121 Nineteenth. The court erred in refusing to give the defendant's twenty-second request to charge the jury as follows: "22. You are further instructed that if you find from the evidence that the defendant ordered from the plaintiff a part of the goods agreed in the written contract between them to be ordered, and in pursuance of such orders, the plaintiff delivered to the defendant a part of the goods described therein, and that on or about the second

day of January, 1894, a settlement was duly made between the plaintiff and the defendant under and in pursuance of the terms of said contract, by which the defendant paid to the plaintiff the balance due it under said contract for the goods so delivered by the plaintiff to the defendant and unsettled for, then your verdict should be for the defendant as to the plaintiff's second, third, and fourth causes of action." The request, refusal and exception are at page 122 of Sten. Min.

Twentieth. The court erred in refusing to give the defendant's twenty-third request to charge the jury as follows: "23. The jury are further instructed that if you find from the evidence that after the acts and conversations which the plaintiff claims constituted a breach of said contract on the defendant's part, the plaintiff and the defendant made a settlement with each other, according to the terms of said contract, and under and in pursuance of it, for the goods that had been delivered to the defendant under said contract, such settlement would constitute a waiver of any damages which the plaintiff might have sustained by reason of any breach of said contract prior to said settlement; for the plaintiff could not treat said contract as existing for the purpose of settling with the defendant for the balance due the plaintiff, but broken for the purpose of recovering damages from the defendant, and in that event your verdict as to the plaintiff's second, third and fourth causes of action should be for the defendant." The request, refusal and exception are at page 122 *et seq.* of Sten. Min.

Twenty-first. The court erred in refusing to give the defendant's twenty-fifth request to charge the jury as follows: "25. The jury are further instructed that even if you should find from the evidence in this case considered by you in the light of the instructions of the court that the plaintiff was entitled to recover on its second, third and fourth causes of action or any one or more of them, still the plaintiff cannot recover from the defendant more than nominal dam-
ages; for where there is a breach of a contract for the failure
122 to order articles agreed to be ordered at a specific price, and which are to be manufactured, the measure of damages for a breach of such a contract is the profits that the plaintiff would have made by the manufacture and sale of such articles according to the terms of the contract, after making a reasonable allowance for less time employed and for release from the care, trouble, risk, and responsibility attending a full execution of the contract. There is nothing in the pleadings in this case nor in the evidence from which you could find what the plaintiff's damages, if any, were, when measured by the rule given you in this instruction. Hence, even although you should find for the plaintiff on said second, third, and fourth causes of action or any one or more of them, you can only award it nominal damages, by which is meant some small sum, such as five cents." The request, refusal and exception are at page 123 *et seq.* of Sten. Min.

Twenty-second. The court erred in refusing to give the defendant's twenty-sixth request to charge the jury as follows: "26. You are further instructed that there is no evidence given by the

plaintiff of the market value of the goods described in the contract of May 8th, 1893, between the parties to this suit at Peoria, St. Louis, Kansas City, Des Moines, or Sioux City. The goods described in the contract between these parties were to be delivered to the defendant at any one of the above-named places, or at Omaha. The plaintiff therefore having failed to furnish any evidence of the market value of said goods at the above-named places has failed to furnish evidence by which you can reach a verdict for any substantial sum in its favor, and therefore you are instructed that in no event can you return a verdict for the plaintiff for more than a mere nominal sum, such as five cents." The request, refusal and exceptions are at page 124 of Sten. Min.

Twenty-third. The court erred in giving the following instruction, to wit: "The measure of damages would be, if the plaintiff is entitled to recover at all, *would be* the difference between what the defendant agreed to pay for the machines when ordered, and the general market price of the machines when the plaintiff might have them on hand at the time they ought to have been delivered, and at the time it is claimed the defendant refused to receive the same;" to which the defendant there and then duly excepted. Page 125, Sten. Min.

Twenty-fourth. The court erred in giving the following instruction, to wit: "So if you find the plaintiff is entitled to recover any sum whatever for his damages sustained, you should ascer-
123 tain the contract price, which you can readily do, from an inspection of the contract itself, and then you will have to determine from the testimony, as well as you can, what was the real market value of the machines in the country at the times and places when the same were to be delivered by the plaintiff on the orders that were to be made by the defendant that is provided in the contract;" to which instruction the defendant there and then duly excepted. Page 125, Sten. Min.

And the said defendant, Kingman & Company, prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that it may be restored to all things that it has lost by reason of the said judgment.

JAMES H. McINTOSH,
Attorney for Defendant.

Upon the back of said assignment of errors appear endorsements in the words and figures following, to wit: 226 Q. Circuit court United States, district of Nebraska. The Western Manufacturing Company, plaintiff, *vs.* Kingman & Company, defendant. Assignment of errors. Filed Jan. 20, 1896. Elmer D. Frank, clerk. James H. McIntosh, attorney for defendant.

Thereupon afterwards, to wit, on the said 20th day of January, 1896, petition for writ of error was filed in said case; which said writ of error is in the words and figures following, to wit:

Petition for Writ of Error.

In the Circuit Court of the United States for the District of Nebraska.

THE WESTERN MANUFACTURING COMPANY, Plaintiff,
vs.
KINGMAN & COMPANY, Defendant.

Now comes the defendant, Kingman & Company, in the above-entitled cause, and complains of the plaintiff, and says that on the 4th day of June, 1895, said plaintiff recovered a judgment against the defendant herein in said court for the sum of nineteen hundred and ninety-six dollars and sixty-six cents ($1,996.66), with the costs of said action to be taxed by the clerk, and this defendant alleges that is was prejudiced by the various orders and rulings and instructions of the court in said cause, and that there is error in the proceedings by which said judgment was obtained, and that the said judgment is erroneous, and the said orders, rulings, and instructions prejudicial in respect to matters and things are
124 shown by the assignment of errors filed herewith and by the record in said cause, and that by reason of said errors the said defendants pray that they may be allowed a writ of error from said judgment of said court in said cause to the United States circuit court of appeals for the eighth circuit, and that a transcript of the record and proceedings, duly authenticated, may be sent to said circuit court of appeals, whereby said judgment may be reversed and said cause remanded to this court for a new trial, and whereby these defendants may obtain such other and further relief as may be just and proper.

KINGMAN & COMPANY,
By JAMES H. McINTOSH,
Its Attorney.

Now, on this 20th day of January, 1896, it is ordered that the aforesaid writ of error be allowed as prayed.

ELMER S. DUNDY, *Judge.*

Upon the back of said petition for writ of error appear endorsements in the words and figures following, to wit: 226 Q. Circuit court United States, district of Nebraska. The Western Manufacturing Company, plaintiff, *vs.* Kingman & Company, defendant. Filed Jan. 20, 1896. Elmer D. Frank, clerk. Petition for writ of error. James H. McIntosh, attorney for defendant.

Thereupon afterwards, to wit, on the said 20th day of January, 1896, a bond was filed in said case; which said bond is in the words and figures following, to wit:

Know all men by these presents that we, Kingman & Company, by A. L. Carson, its manager, as principal, and Fred. H. Davis, as surety, are held and firmly bound unto the Western Manufacturing Company in the full and just sum of forty-five hundred dollars

($4,500), to be paid to the said The Western Manufacturing Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twentieth day of January, in the year of our Lord one thousand eight hundred and ninety-six.

Whereas lately, at the May term, A. D. 1895, of the circuit court of the United States for the district of Nebraska, in a suit depending in said court between The Western Manufacturing Company as plaintiff and Kingman & Company as defendant, judgment
125 was rendered against the said Kingman & Company for the sum of nineteen hundred ninety-six and $\frac{66}{100}$ dollars and costs, and the said Kingman & Company has obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Western Manufacturing Company citing and admonishing it to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation:

Now, the condition of the above obligation is such that if the said Kingman & Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make good its said plea, then the above obligation to be void; else to remain in full force and virtue.

KINGMAN & CO., [SEAL.]
By A. L. CARSON, *Mgr.* [SEAL.]
FIRST NAT'L BANK OF OMAHA, [SEAL.]
F. H. DAVIS, *Cash'r.*
FRED. H. DAVIS.

Sealed and delivered in presence of—
J. W. BATTIN.

Approved by—
ELMER S. DUNDY, *Judge.*

No. 226 Q. United States circuit court, district of Nebraska. The Western Manufacturing Company *vs.* Kingman & Company. Bond. $8—. Filed 20th day of Jan., 1896. Elmer D. Frank, clerk.

Thereupon afterwards, to wit, on the said 20th day of January, 1896, a writ of error was allowed in said case, and a citation duly issued thereon and returned and filed January 22, 1896, the following of which are the originals:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Nebraska, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you,

at the May term, 1895, thereof, between The Western Manufacturing Company as plaintiff and Kingman & Company as defendant, a manifest error hath happened, to the great damage of the said Kingman & Company, defendant, as by its complaint appears, we, being willing that error, if any hath been, should be duly cor-
126 rected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit on or before the 20th day of March, 1896, to the end that, the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 20th day of January, in the year of our Lord one thousand eight hundred and ninety-six. Issued at office, in the city of Omaha, Nebraska, with the seal of the circuit court of the United States for the district of Nebraska, dated as aforesaid.

Seal United States Circuit Court, District of Nebraska.

ELMER D. FRANK,
Clerk Circuit Court United States, District of Nebraska,
By E. S. DUNDY, JR., *Deputy.*

Allowed by—
ELMER S. DUNDY, *Judge.*

Return to Writ.

UNITED STATES OF AMERICA, }
District of Nebraska, } *ss:*

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals for the eighth circuit a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at office, in the city of Omaha, this third day of March, A. D. 1896.

Seal United States Circuit Court, District of Nebraska.

ELMER D. FRANK,
Clerk of said Court,
By R. R. BITTINGER, *Deputy.*

127 No. 226 Q. United States circuit court, district of Nebraska. The Western Manufacturing Co. *vs.* Kingman & Co. Writ of error. To the circuit court of the United States for the district of Nebraska. Filed Jan. 20, 1896. Elmer D. Frank, clerk.

The United States of America to the Western Manufacturing Company, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein Kingman & Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Seal United States Circuit Court, District of Nebraska.

Witness the Honorable Elmer S. Dundy, judge of the circuit court of the United States for the district of Nebraska, this twentieth day of January, in the year of our Lord one thousand eight hundred and ninety-six.

ELMER S. DUNDY,
United States District Judge for the District of Nebraska.

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 21st day of January, 1896, I received this citation and on the 21st day of January 1896 I served the same upon the within-named The Western Manufacturing Company, by H. J. Walsh president of said company and on Lamb and Adams by Geo. A. Adams, a member of said firm, attorneys for the Western Manufacturing Company in Lancaster county, State and district of Nebraska, by delivering to and leaving with each of them a certified copy thereof, with all the endorsements thereon.

FRANK E. WHITE,
United States Marshal for the District of Nebraska.

Filed Jan. 22, 1896.

ELMER D. FRANK, *Clerk.*

Marshal's Costs.

Service	4 00
Mileage	12
	$4 12

128 No. 226 Q. United States circuit court, district of Nebraska. The Western Manufacturing Company *vs.* Kingman & Company. Citation. Filed Jan. 22, 1896. Elmer D. Frank, clerk.

UNITED STATES OF AMERICA, *District of Nebraska,* } *ss:*

Pursuant to the foregoing writ of error, and in obedience thereto, I, Elmer D. Frank, clerk of the circuit court of the United States, for the district of Nebraska, do hereby certify that the foregoing

folios from one (1) to two hundred and eleven (211) inclusive, contain true and faithful transcripts of all the pleadings, process and proceedings, of record and on file in said court, in the case of The Western Manufacturing Company *versus* Kingman and Company, and that copies of the writ of error and citation duly certified, have been lodged and remain in my said office as such clerk.

Witness my hand and the seal of said circuit court, at Omaha, in said district, this third day of March, A. D. 1896.

Seal United States Circuit Court, District of Nebraska.

ELMER D. FRANK, *Clerk*,
By R. R. BITTINGER, *Deputy*.

Filed Mar. 14, 1896.

JOHN D. JORDAN, *Clerk*.

129 And on the fourteenth day of March, A. D. 1896, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1896.

KINGMAN & COMPANY, Plaintiff in Error,
vs.
THE WESTERN MANUFACTURING CO. } No. 763.

The clerk will enter my appearance as counsel for the plaintiff in error.

JAMES H. McINTOSH.

Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1896. No. 763. Kingman & Co., plaintiff in error, *vs.* Western Mfg. Co. Appearance. Filed Mar. 14, 1896. John D. Jordan, clerk. James H. McIntosh, Omaha, Neb., counsel for pl'ff in error.

And on the fourteenth day of March, A. D. 1896, an appearance of Mr. G. M. Lambertson, as counsel for defendant in error, was filed in the clerk's office of said circuit court of appeals in the words and figures following:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1896.

KINGMAN AND COMPANY, Plaintiff in Error,
vs.
THE WESTERN MANUFACTURING COMPANY. } No. 763.

The clerk will enter my appearance as counsel for the defendant in error.

G. M. LAMBERTSON.

130 Endorsed: U. S. circuit court of appeals, eighth circuit, May term, 1896. No. 763. Kingman & Company, plaintiff in error, *vs.* Western Mfg. Co. Appearance. Filed Mar. 14, 1896. John D. Jordan, clerk. G. M. Lambertson, counsel for def't in error.

And on the sixteenth day of March, A. D. 1896, an appearance of Mr. Walter J. Lamb, as counsel for defendant in error, was filed in the clerk's office of said circuit court of appeals in the words and figures following:

In the Circuit Court of Appeals of the United States for the Eighth Circuit.

KINGMAN & COMPANY, Plaintiff in Error,
vs.
THE WESTERN MANUFACTURING COMPANY

Now, on this 17th day of March, 1896, came Walter J. Lamb, for the Western Manufacturing Company, as one of their solicitors, and enters his appearance in the above-entitled cause.

WALTER J. LAMB,
Lincoln, Neb., Solicitor for the Western Manufacturing Company.

Endorsed: No. 763. U. S. circuit court of appeals, 8th circuit. Kingman & Company, pl'ff in error, *vs.* The Western Manufacturing Company, def't in error. Appearance. Filed Mar. 16, 1896. John D. Jordan, clerk. Walter J. Lamb, Lincoln, Nebraska, sol. for def'ts in error.

131 And on the first day of May, A. D. 1896, a motion to dismiss writ of error, with notice and proof of service thereof, was filed in the clerk's office of said circuit court of appeals in the words and figures following, to wit:

To the Honorable James H. McIntosh, attorney for Kingman & Company:

Please take notice that the defendant in error has filed in the United States circuit court of appeals, eighth circuit, at St. Paul, a motion in the case wherein Kingman & Company is plaintiff in error and The Western Manufacturing Company is defendant in error, a copy of which is hereto attached, to dismiss the appeal in said cause, and the same will be brought on for hearing before the said court on the 6 day of May, 1896, at the opening of court on that day, or as soon thereafter as same can be heard.

WALTER J. LAMB &
LAMB AND ADAMS,
Att'ys for Defendant in Error.

STATE OF NEBRASKA, } ss:
Douglas County, }

M. A. Lathrop, being first duly sworn, on oath says he served the above and attached notice, with a copy of the motion filed in said action, upon James H. McIntosh, Esq., at the city of Omaha, Nebraska, on the 27th day of April, 1896, by delivering to him a true copy of the same, and further affiant saith not.

M. A. LATHROP.

Subscribed in my presence and sworn to before me this 27th day of April, 1896.

T. K. SUDBOROUGH,
[SEAL.] *Notary Public.*

132 In the United States Circuit Court of Appeals, Eighth Circuit, May Term, 1896.

KINGMAN & COMPANY, Plaintiff in Error,
vs.
THE WESTERN MANUFACTURING COMPANY, Defendant in Error. } No. 763.

Comes now the defendant, The Western Manufacturing Company, and moves the court for an order dismissing this appeal for the following reasons:

1st. Because the court has no jurisdiction of the said cause.

2nd. Because more than six months intervened between the date of the rendition of the judgment in said action and the date of allowing and taking out the writ of error in said cause.

3rd. Because more than six months intervened between the date of the rendition of judgment in said cause and the filing of any assignments of error in the said cause in the circuit court.

4th. Because more than six months intervened between the date of the entry of judgment in said cause and the filing of the petition for writ of error in said cause in the circuit court.

5th. Because more than six months intervened between the date of the entry of the judgment in said cause and the time of filing the supersedeas bond in said cause.

6th. Because more than six months intervened between the time of the entry of judgment in said cause and the showing of citation therein.

WALTER J. LAMB,
Att'y for The Western Mfg. Co., Defendant in Error.

U. S. *vs.* Baxter, 51 Fed. Repr., 624.
U. P. R'y Co. *vs.* Col. Eastern R'y Co., 54 Fed. R., 22–21.
Condran *vs.* Chi., M. & St. P. R'y, 67 Fed. R., 522.

133 Endorsed: No. 763. In the United States circuit court of appeals, eighth circuit, May term, 1896. No. 763. Kingman & Company, pl'ff in error, *vs.* The Western Mfg. Co., def. in error. Original motion and notice to dismiss appeal. Filed May 1, 1896. John D. Jordan, clerk. Walter J. Lamb, att'y for The Western Mfg. Co., defendant in error.

And on the twenty-first day of May, A. D. 1896, in the record of the proceedings of said circuit court of appeals is an entry of submission of the motion to dismiss the writ of error in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1896.

THURSDAY, *May* 21, 1896.

KINGMAN AND COMPANY, Plaintiff in Error,
vs.
WESTERN MANUFACTURING COMPANY, Defendant in Error. } No. 763.

In error to the circuit court of the United States for the district of Nebraska.

This cause having been called for hearing upon the motion filed by defendant in error to dismiss the writ of error herein, and was argued by Mr. Walter J. Lamb, in support, and by Mr. James H. McIntosh, opposing, thereupon the said motion to dismiss was submitted to the court.

And on the twenty-first day of May, A. D. 1896, in the record of proceedings of said circuit court of appeals is a judgment in said cause in the words and figures following, to wit:

134 United States Circuit Court of Appeals, Eighth Circuit, May Term, 1896.

THURSDAY, *May* 21, 1896.

KINGMAN AND COMPANY, Plaintiff in Error,
vs.
THE WESTERN MANUFACTURING COMPANY, Defendant in Error. } No. 763.

In error to the circuit court of the United States for the district of Nebraska.

This cause having been called for hearing upon the motion of defendant in error to dismiss the writ of error herein, and was argued by counsel, on consideration whereof it is now here ordered and adjudged by this court that the writ of error in this cause be, and the same is hereby, dismissed, with costs, for want of jurisdiction, and that the Western Manufacturing Company have and recover against Kingman and Company the sum of twenty dollars for its costs herein and have execution therefor.

May 21, 1896.

And on the twenty-fourth day of June, A. D. 1896, there was filed in the clerk's office of said circuit court of appeals a petition for rehearing on the motion to dismiss the writ of error in the words and figures following, to wit:

135 United States Circuit Court of Appeals, Eighth Circuit, May Term, 1896.

KINGMAN & COMPANY, Plaintiff in Error,
vs.
THE WESTERN MANUFACTURING COMPANY, Defendant in Error.
No. 763. Petition for Rehearing.

To the United States circuit court of appeals for the eighth circuit and to the honorable the judges thereof:

And now comes Kingman & Company, the plaintiff in error, and respectfully presents its petition for rehearing of the motion of the above-named defendant in error to dismiss the plaintiff in error's writ of error, for the reason that said writ of error was duly sued out and prosecuted within six months from the entry of the final judgment herein, as required by law, as appears from the following considerations of fact and law, to wit:

1. The verdict was returned at the May, 1895, term of said
136 court, on the 4th day of June, and upon receiving the verdict judgment was entered thereon at once, according to the usual practice of the court. The motion for a new trial was filed June 6th thereafter, being still the May, 1895, term of said court.

"Afterwards, to wit, at the November, 1895, term of said court, and on the 11th day of December, 1895, the following proceedings were had and done in said case, as appears of record on folio 254, Journal U of said court, to wit:

"THE WESTERN MANUFACTURING COMPANY
vs.
KINGMAN & COMPANY.
226 Q.

"This cause having been heard on the motion of the defendant to set aside the judgment herein, was argued and submitted to the court by the attorneys of the respective parties, whereupon, after careful consideration thereof, and being fully advised in the premises, it is now, on this day, considered, ordered, and adjudged by the court that said motion be, and the same is hereby, overruled, and that the judgment heretofore entered herein be and remain absolute."

December 12th, thirty days were given plaintiff in error to prepare and present its bill of exceptions. The bill of exceptions was presented for signature January 9th, and allowed and filed January 11th. The writ of error was allowed January 20th, the citation was served January 21st, and the record filed in this court March 14th.

2. I respectfully submit that the filing of the motion for a new trial as it was done in this case was proper procedure.

(*a*.) In the judiciary act of 1789 it was provided that "all of said courts shall have power to grant new trials, in cases where
137 there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law."

Revised Stat. United States, sec. 726.

At the time this statute was passed the remedy by motion for a new trial was, and long had been, a well-recognized common-law remedy. The motion was made as a matter of right, except that it "must be made within the first four days of the next succeeding term, within which term it is usually heard and decided."

III Cooley's Blackstone, 3rd ed., 391.

(*b.*) It has been the usage and practice of the bar of this district to file a motion for a new trial, as was done in this case, within three days after the entry of the judgment. This is after the analogy of the State practice, which provides for the filing of a motion for a new trial within three days after the return of the verdict. The court for this district has always, without exception, recognized this as proper practice, has always acted upon such motions, sometimes sustaining and sometimes overruling them. I submit there is high authority for recognizing the usage and practice of the particular court as entitled to be considered.

Silsby *v.* Foot, 20 How., 290, 295.

The filing of a motion for a new trial in this manner has practically become a rule of the circuit court for the district of Nebraska; and I submit such a rule is valid under the authority of section 918 of Revised Statutes, giving the circuit court power to make rules and orders regulating their own practice. The rules of the circuit court for the southern district of New York, for the northern district of Vermont, and for the District of Columbia, relating to motions for new trials, have not been questioned, and yet they are each quite as much outside of the letter of any statute as the rule
138 prevailing in the circuit court for the district of Nebraska allowing such a motion to be filed at any time within three days of the entry of the judgment.

Blatchford on Rules and Statistics of United States Courts, 406, 632, 654, 718.

(*d.*) Motion for a new trial is spoken of and recognized as a customary, proper, and established form of procedure of this court.

Marine Ins. Co. *v.* Young, 5 Cranch, 186 (1809).
Henderson *v.* Moore, 5 Cranch, 11 (1809).
Blunt *v.* Smith, 7 Wheat., 248 (1822).
Lanahan *v.* Ins. Co., 1 Pet., 170 (1828).
United States *v.* Buford, 3 Pet., 12 (1830).
New York Life Ins. Co. *v.* Wilson, 8 Pet., 291 (1834).
Boswell *v.* De Le Lanza, 20 How., 29 (1857).
Warner *v.* Morton, 20 How., 448 (1857).
Insurance Co. *v.* Barton, 13 Wall., 603 (1871).
Railway Co. *v.* Heck, — U. S., 120 (1880).

(*e.*) A motion for a new trial is the only remedy in certain cases.

Mulhall *v.* Keenan, 18 Wall., 342.
Babcock *v.* City, 3 Wall., 240.

(*f.*) Remedy by motion for new trial is a common-law remedy, existing probably independent of statute, and is an incident to the

general powers of the court. It is a convenient and useful general remedy guaranteed by section 726 above quoted. Brown *v.* Evidence, 18 Fed., 56. Its convenience and general usefulness as a form of relief are not intended to be impaired or curtailed by section 987
139 of the Revised Statutes. That section is supplementary to the usual remedy by motion, and enlarges the rights of the defeated party when he invokes the privileges by it conferred. Perhaps it will be convenient if I quote the section:

"SECTION 987. When a circuit court enters judgments in a civil action, either upon a verdict or on a finding of the court upon the facts, in cases where such finding is allowed, execution may on motion of either party, at the discretion of the court, and on such conditions for the security of the adverse party as it may judge proper, be stayed 42 days from the time of entering judgment, to give time to file in the clerk's office of said court a petition for a new trial. If such petition is filed within said term of 42 days, with a certificate thereon of any judge of said court, that he allows it to be filed, which certificate he may make or refuse at his discretion, execution shall as of course be further stayed to the next session of said court. If a new trial be granted, the former judgment shall be thereby rendered void."

The objects and effect of this section are threefold: (1) to confer upon the courts the power to extend the time for the preparation for the application for a new trial; (2) to carry the case over, if need be, into the succeeding term, and thus to allow the defeated party to file his petition for a new trial at the term after the one at which the judgment was entered, if the judgment was entered so near the end of the trial term that the motion for new trial could not properly be prepared and filed before the term ended; (3) to stay execution until the question as to whether or not the judgment ought to stand can be determined. Section 987 and the section following it, are the only provisions for the stay of execution. One provides for a stay when it is doubtful whether or not the judgment ought to stand; the other provides for a stay when the State laws in the State where the court is held does the like.

140 The foregoing was evidently Mr. Circuit Judge McCrary's view, for in speaking of the effect of said section 987, Mr. Circuit Judge McCrary, in Rutherford *v.* Penn. Mutual Life Ins. Co., 1 Fed. Rep., 456, said: "Now this is not the only section under which the party can apply for a new trial. His right to apply is independent of this section. This provides for a case where he desires to obtain from the court an extension of the usual time within which to make his application for a new trial; and in that case, where he gets such time merely to apply, he must show that he has presented his petition, and that it has been allowed in accordance with the provisions of the section; but if he makes his motion for a new trial, without asking for time, then he can make it independent of section 987, and is not bound by the provisions of that section. In other words, the court had a perfect right to entertain the motion for a new trial, it did entertain it, and suspended the execution until it should be determined."

2. The motion in this case, although called a motion, possesses all the requisite of a petition, and is substantially a petition.

Burger *v.* Jones, 4 Met. (Mass.), 471.

Besides, if the pleading was defective in form, the defect was waived by going to hearing on it. The court regards the substance of the thing, and not the form. Mr. Circuit Judge Putnam in Andrews *v.* Thum, 64 Fed. Rep., 149 (C. C. A. Mass.), said: "The motion filed May 6th, 1893, and heard after the entry of the decree of May 13th, 1893, must be regarded as in effect the same as a petition for a rehearing, filed after judgment, under rule 29. It was heard on its merits without objection, and can have no other possible effect. It was entirely lacking in form, but in the Federal courts, when substance is preserved, defect of form is easily waived as was done in this case."

3. Leave to file a motion of this character is not required.
141 The only case in which leave to file is necessary is where the party desires his petition to operate, under second 987, to stay execution. If the application is not filed for 42 days after the entry of the judgment, maybe and very likely after the term at which the judgment was entered, there ought to be some good reason for filing it, and obviously it ought not to be filed at that late day, and operate to stay execution, without leave to file it. If filed, however, within the 42 days without leave and before the end of the term, perhaps it could properly be acted upon, and a new trial granted or refused, but the filing of it would not stay execution until the hearing, unless it was filed with leave. This point, however, has not been decided, and is not material here. I beg to suggest it as a fair construction of that part of section 987 relating to leave to file.

4. If leave to file were necessary, however, I submit it will be presumed in this case that leave was granted, because the motion was entertained by the court; the parties treated it as properly filed; the recital of the record is that "it was argued and submitted to the court by the attorneys for the respective parties."

It is respectfully suggested that it would be a fair test of the effect of the failure of the record affirmatively to show that the motion was filed with leave, to consider that as the only question in the case. Assume that the statute provided that the judgment should not be deemed final until the overruling of the motion for new trial that was filed with leave of court, and the record came up not showing leave to file the motion, but showing that the motion was seasonably filed, was argued and submitted to the court by the attorneys for the respective parties, and was carefully considered by the court, what would your honors say in response to a motion to dismiss the writ
142 because the record did not show that the motion was filed with leave? Similar cases have often occurred, and have always been controlled by the general maxim, *omnia præsumuntur rite esse acta.*

5. It is submitted that the recitals of the record here, that "this cause having been heard on the motion of defendant to set aside the judgment and the verdict, and for a new trial herein, was argued

and submitted to the court by the attorneys for the respective parties, whereupon after careful consideration thereof, and being fully advised in the premises, it is now, on this day considered," etc., fairly creates the presumption that the motion was entertained by the court in the first instance, and was argued and submitted during the trial term, and was held under advisement in the meantime.

In addition to the usual presumption relating to the regularity of the proceedings of the courts, and general principles of construction of records, I invite your honors to consider the language of Mr. Chief Justice Fuller in a case where it was urged that an appeal was taken too late, because it did not affirmatively appear that the petition for rehearing was filed during the term at which the decree was entered, or was entertained by the court, as follows: "But it is said this cannot be the result, under either statute or rule, of the mere filing of a motion or petition for rehearing, and that it does not affirmatively appear in this case that the motion or petition was entertained by the court. But we should be inclined to hold, if a decision in that regard were called for, that since the application was passed upon as having been duly made, the presumption must be indulged that it was entertained by the court in the first instance, and during the term at which the decree was pronounced."

Aspen Mining & Smelting Co. *v.* Billings, 150 U. S., 31.

143 6. In view of this situation and the condition of this record, I beg respectfully to submit that it is held by an unbroken line of authorities in the Federal courts, to the best of my knowledge and belief without a single contrary decision or word of *obiter dictum*, that where, as here, a motion for rehearing "is made or presented in season, and entertained by the court, the time limited for a writ of error, or appeal, does not begin to run until the motion or petition is disposed of. Until then, the judgment or decree does not take final effect, for the purposes of the writ of error or appeal."

Northern Pacific Railroad Co. *v.* Holmes, 155 U. S., 137.

This subject was fully considered in the late case of Aspen Mining & Smelting Co. *v.* Billings, 150 U. S., 31 (Oct. 23rd, 1893). In that case the decree was entered October 20th, 1890, one of the days of the May term, 1890, of the circuit court for the district of Colorado. A motion for a rehearing was filed October 25th, 1890. The November term commenced November 4th, 1890, and adjourned March 20th, 1891. "On April 26th, 1891, the complainants filed in the case a request for decision on the motion for rehearing, which recited that the motion had been submitted in open court at the beginning or very early in the last term. The May term, 1891, opened on the first Tuesday, being the 5th day of May, 1891, and on that day the record recited that 'the motion for a rehearing of this cause having heretofore come on to be heard, and having been submitted on proofs, the court being sufficiently advised, denied the motion.'" On July 2nd, 1891, one of the days of the May term, 1891, of the court, complainants prayed an appeal to the United States circuit court of appeals for the eighth circuit, which was allowed. The

citation was allowed August 15th, 1891, and duly served. Such being the dates and facts of the case, and inasmuch as I deem
144 this decision of great importance in the present controversy, I desire to quote in full the decision of the court, by Mr. Chief Justice Fuller, on this point, omitting only the last paragraph thereof, which is already quoted in the paragraph marked 5 above, to wit:

"The decree dismissing complainant's bill was entered on October 20th, 1890, but an application for a rehearing was made shortly thereafter, and during the same term, but not disposed of until May 5th, 1891.

"The rule is, that if a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purpose of the writ of appeal. Brockett *v.* Brockett, 2 How., 238, 249; Texas & Pacific Railway *v.* Murphy, 111 U. S., 488; Memphis *v.* Brown, 94 U. S., 715.

"If this case falls within that catagory, then the six months within which the appeal had to be taken under section 11 of the judiciary act of March 3, 1891, did not commence to run until May 5th, 1891, and the appeal was in time.

"It is true that equity rule 88 provides that no rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded if an appeal lies to the Supreme Court; but if this petition for rehearing was filed in season and entertained by the court, then the decree, although entered in form, did not discharge the parties from their attendance in the cause, and they were bound to follow the petition thus pending to the next term. The suit was thereby prolonged until the application was disposed of in the regular course of proceedings. This is expressly so ruled in Goddard *v.* Ordway, *supra*.

"In Giant Powder Co. *v.* California Vigorit Powder Co., 5
145 Fed. Rep., 197, S. C., 6 Sawyer, 508, it was said by Mr. Justice Field that equity rule 88 applies only where no petition is presented during the term, and the numerous cases in which it has been held that the time limited for an appeal does not begin to run until a petition for a rehearing properly presented has been disposed of, sustain that view. The decree does not in legal effect remain final while the petition is pending, and the prescription of rule 88 must be construed to mean that a rehearing cannot be granted after the lapse of the term, unless application is made therefor during the term, and being entertained, the decree is thereby prevented from passing beyond the control of the court. The entertaining of the petition keeps the jurisdiction alive, and the granting of the rehearing may be made absolute, or denied thereafter, as the court may determine."

The last-above decision is certainly high authority for the position I am urging, unless the effect of a motion for a rehearing in a suit in equity can be distinguished from the effect thereof in an action at law. But the practice act provides, section 1012, that ap-

peals from the circuit courts shall be subject to the same rules, regulations and restrictions as are, or may be prescribed in cases of writs of error. Appeals and writs of error could not be subject to the same rules, regulations and restrictions, if the time for taking an appeal were six months after the overruling of the motion for a rehearing in an equity suit, and not within six months after overruling the like motion in an action at law. Appeals and writs of error are put in the same category in the act of establishing this court, in section 11, relating to the time for taking appeals and writs of error.

The justices of the Supreme Court, in speaking of the effect of a motion for a rehearing on the time for taking an appeal or writ of error always refer to appeal and writ of error in the same
146 connection, and as similarly affected; and the rulings of that court, with relation to the effect of such a motion have been the same in actions at law as in suits in equity.

In Memphis *v.* Brown, 94 U. S., 715, Mr. Chief Justice Waite said: "Under the ruling in Brockett *v.* Brockett, 2 How., 241, the motion made during the term, to set aside the judgment of March 2nd, suspended the operation of that judgment, so that it did not take effect for the purposes of a writ of error until May 20th, when the motion was disposed of."

In Goddard *v.* Ordway, 101 U. S., 745, a motion was made and entered on the minutes to vacate the affirmance of the decree, and grant a reargument. Nothing further was done at that term of court. It was held that the motion prolonged the suit, and the parties thereto were in court until it should be finally disposed of. The court there said: "A paper may be filed in the proper office, and yet not brought to the attention of the court while sitting in judgment, but when what it calls for, appears on the minutes of the actual proceedings, it must be presumed that the court, in some form, gave it judicial attention, and that it was presented in some regular way. In the supreme court of the district, as we are advised if any matter in hand is not disposed of at one term, it is deemed to have been continued to the next. Whatever parties are bound to take notice of one term, they must follow to the next, if they are not, in some appropriate form, dismissed from further attendance. In this case, the motion for reargument went over as unfinished business, and carried the parties with it. The proceeding was, in all material respects, like a motion for a new trial, filed in time at one term, and not disposed of until the next. Under such circumstances, a judgment or decree, although entered in form, does
147 not discharge the parties from their attendance on the cause. They must remain until all questions as to finalty of what has been done or settled. The motion, when entertained, prolongs the suit, and keeps the parties in court until it is passed upon, and disposed of, in the regular course of proceeding."

In Voorhees *v.* Manufacturing Co., 151 U. S., 135, it was held that an appeal could not be taken from a decree, while a motion for a rehearing was pending, and that "the taking of a new appeal becomes necessary, upon the denying of the rehearing."

The effect of a motion for a new trial has often been considered in connection with the question of the right to a supersedeas.

Brockett *v.* Brockett, 2 How., 238, decided by Mr. Justice Story, in 1844, is a leading case on this subject. It was a suit in which a final decree was rendered on the 10th of May. On the 26th of the same month, a petition was filed to have the final decree opened for certain purposes. The court took cognizance of the proceedings, and referred it to a master commissioner. His report was made on the 9th of June, and the court then refused to open the final decree. Under the statute in force at that time, an appeal might operate as a supersedeas, if taken, and the appeal bond filed within ten days, Sundays excepted, after the entry of the final decree. Mr. Justice Story disposed of the question in the following language: "Now, the argument is, that as the original decree was rendered more than one month before the appeal, it could not operate, under the laws of the United States as a supersedeas, or to stay execution on the decree, and because to have such an effect the appeal should be made, and the bond should be given, within ten days after the final decree. But the short and conclusive answer to this objection
148 is, that the final decree of the 10th of May was suspended by the subsequent action of the court, and it did not take effect until the 9th of June, and that the appeal was duly taken, and the appeal bond given, within ten days from this last period."

In the Slaughter House cases, 10 Wall., 273, the decision was rendered April 11th, 1870; petition for rehearing filed April 26th, 1870, which was overruled May 9th, 1870, and writ of error allowed May 13th, and filed May 16th, 1870. It was then held that the writ operated as a supersedeas under the statute requiring writ of error to be filed within ten days, Sundays excepted, from the date of the final judgment or decree, Mr. Justice Clifford who delivered the opinion of the court said: "Filed, as the writs of error were, within ten days from the date of the entry refusing the petition for rehearing, it is claimed by the plaintiffs that the several writs of error operate as a supersedeas, and stay execution under the 23rd section of the judiciary act. Doubts were at one time entertained upon that subject, but since the decision in the case of Brockett *v.* Brockett, the question must be considered as settled in accordance with the views of the plaintiffs."

In Texas & Pacific Railroad Co. *v.* Murphy, 111 U. S., 488, the judgment was entered May 29th, 1883. A motion for a rehearing was made, and was decided December 21st, 1883. The question was, within what time did the sixty days, within which to sue out and serve the writ of error, for the purpose of a supersedeas, commence to run. It was held that the time limited for the writ of error did not begin to run until the motion for a rehearing was disposed of, and that the sixty days commenced to run after the latter date, the court saying: "It was expressly ruled in Brockett *v.* Brockett, which has been followed in many cases since, that if the petition for rehearing is presented in season, and entertained by the court,
149 the time limited for an appeal or writ of error does not begin to run until the petition is disposed of. Slaughter House

cases, 10 Wall., 273, 289; Memphis *v.* Brown, 94 U. S., 715, 717. The motion for a rehearing in this case was not decided until December 21st, and the writ of error was sued out, and served, within sixty days thereafter. This was in time to secure the supersedeas."

Your petitioner therefore respectfully prays that this case be restored to the docket, and a reargument be ordered upon the merits of the defendant in error's motion to dismiss this writ, and that your honors will designate a time and place for such rehearing, and that your honors will set aside the order and judgment sustaining said motion, and dismissing said writ of error, and will set said cause down for rehearing on its merits.

The undersigned, member of the bar of this honorable court, humbly conceives that it is proper that the defendant in error's motion to dismiss this writ of error should be reheard by this court, if this court shall see fit so to order, and he therefore respectfully certifies accordingly.

Omaha, Nebraska, June 18th, 1896.

JAMES H. McINTOSH,
Of Counsel and Attorney for Plaintiff in Error.

(Endorsed:) Filed Jun- 24, 1896, John D. Jordan, clerk.

150 And on the twenty-first day of September, A. D. 1896, in the record of the proceedings of said circuit court of appeals is an order denying the petition for rehearing in words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1896.

MONDAY, *September* 21, 1896.

KINGMAN AND COMPANY, Plaintiff in Error,
vs.
THE WESTERN MANUFACTURING COMPANY, Defendant in Error. } No. 763.

In error to the circuit court of the United States for the district of Nebraska.

This cause came on to be heard upon the petition for a rehearing filed by counsel for plaintiff in error heretofore submitted to the court. On consideration whereof it is now here ordered by this court that said petition for a rehearing be, and the same is hereby, denied.

It is further ordered, on motion of counsel for plaintiff in error, that the mandate in this cause be, and the same is hereby, stayed until the first Monday in November, it being the second day of November, A. D. 1896.

September 21, 1896.

151 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing one hundred and fifty pages contain a full, true, and complete copy of parts of the transcript of record from the circuit court, printed in accordance with the designation filed by plaintiff in error for the use of said United States circuit court of appeals on the hearing of the said cause, and full, true, and complete copies of all pleadings, proceedings, and record entries in said United States circuit court of appeals in the case of Kingman and Company, plaintiff in error, *vs.* The Western Manufacturing Company, defendant in error, No. 763, May term, 1896, as full, true, and complete as the same remain upon the files and records of said United States circuit court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of St. Louis, Missouri, this sixth day of October, A. D. 1896.

Seal United States Circuit Court of Appeals, Eighth Circuit.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals for the Eighth Circuit.

152 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Being informed that there is now pending before you a suit in which Kingman & Company is plaintiff in error and The Western Manufacturing Company is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Nebraska, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme
153 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of October, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

154 [Endorsed:] Supreme Court of the United States. No. 635. October term, 1896. Kingman & Company *vs.* The Western Manuf'g Company. Writ of certiorari. Filed Nov. 2, 1896. John D. Jordan, clerk.

155 In the United States Circuit Court of Appeals for the Eighth Circuit.

KINGMAN & COMPANY, Plaintiff in Error,
vs.
THE WESTERN MANUFACTURING COMPANY, Defendant in Error. } Stipulation.

It is hereby stipulated and agreed by and between the parties hereto that the certified copy of the entire record of the above-entitled cause in the circuit court of appeals, which was furnished by the above-named plaintiff in error, pursuant to section 3 of rule 37, relating to cases from circuit courts of appeal, of the rules of the Supreme Court of the United States, as a part of its application to said Supreme Court to require said cause to be certified to said Supreme Court for its review and determination, under section 6 of the act entitled "An act to establish circuit courts of appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3rd, 1891, shall be taken as a return to the writ of certiorari granted by the Supreme Court of the United States on Monday, the 26th day of October, 1896, in the said case of Kingman & Company, plaintiff in error, *vs.* The Western Manufacturing Company, defendant in error, and the clerk of the United States circuit court of appeals for the eighth circuit is hereby requested to send up to the said Supreme Court of the United States a copy of this stipulation as his return to said writ of certiorari.

KINGMAN & COMPANY, *Plaintiff in Error,*
By JAMES H. McINTOSH, *Its Attorney.*
THE WESTERN MANUFACTURING CO.,
Defendant in Error,
By WALTER J. LAMB, *Its Attorney.*

Endorsed: United States circuit court of appeals, eighth circuit. Kingman & Company, plaintiff in error, *vs.* The Western Manufacturing Company, defendant in error. Stipulation. Filed Nov. 4, 1896. John D. Jordan, clerk.

156 *Return to Writ of Certiorari.*

UNITED STATES OF AMERICA, *Eighth Circuit,* } *ss:*

In obedience to the command of the foregoing writ of certiorari and in pursuance of the stipulation of the parties, a full and true copy of which is hereto attached, I do hereby certify and return that the transcript of the record filed with the application to the Supreme Court of the United States for a writ of certiorari in the case of Kingman and Company, plaintiff in error, *vs.* The Western Manufacturing Company is a full, true, and complete transcript of the record upon which said cause was heard in the United States circuit court of appeals, together with all proceedings in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, this fifth day of November, A. D. 1896.

Seal United States Circuit Court of Appeals, Eighth Circuit.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

[Endorsed:] Supreme Court of the United States. No. 635. October term, 1896. Kingman and Company, plaintiff in error, *vs.* The Western Manufacturing Company. Writ of certiorari, copy of stipulation, and the clerk's return to writ.

157 [Endorsed:] Case No. 16,414. Supreme Court U. S., October term, 1897. Term No., 248. Kingman & Co., P. E., *vs.* The Western Manufacturing Co. Writ of certiorari and return. Filed Nov. 7, 1896.

OCT 19 1896
JAMES H. McKENNEY,
CLERK

IN THE SUPREME COURT

OF THE UNITED STATES.

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OCTOBER TERM, 1896.

EX PARTE KINGMAN & COMPANY,
PETITIONER.

PETITION FOR WRIT OF CERTIORARI.

JAMES H. McINTOSH,
Attorney for Petitioner.

Baker, Printer, N. Y. Life Building, Omaha.

IN THE SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, 1896.

EX PARTE KINGMAN & COMPANY, PETITIONER:

Petition for writ of certiorari requiring the Circuit Court of Appeals for the Eight Circuit to certify to the Supreme Court for its review and determination the case of *Kingman & Company, Plaintiff in Error, vs. The Western Manufacturing Company, Defendant in Error.*

To the Honorable the Supreme Court of the United States:

The petition of Kingman & Company respectfully shows to this Honorable Court as follows:

I. That on the 17th day of February, 1894 The Western Manufacturing Company, a corporation organized and existing under and by virtue of the laws of the State of Nebraska, and a resident and citizen of Nebraska, commenced an action in the District Court for Lancaster County, Nebraska, against your petitioner, a corporation organized and existing under and by virtue of the laws of the State of Illinois, and a resident and citizen of Illinois, for damages for breach of contract, the amount in controversy therein, exclusive of interest and costs exceeding the sum or value of Two Thousand Dollars; that your petitioner duly removed said cause into the Circuit Court of the United States for the District of Nebraska on the ground of diverse citizenship.

II. That issues were duly joined between said parties

in said cause in said Circuit Court of the United States for the District of Nebraska, and such proceedings were had therein that said cause duly came on for trial before a jury at the May, 1895, Term of said Court, resulting in a verdict against your petitioner, on the 4th day of June, 1895, of said May Term, for the sum of $1,996.66. On the coming in of said verdict, the Court, according to its usual custom in jury trials, at once rendered a judgment on said verdict.

III. Your petitioner further says that within three days after said verdict and judgment, and on the 6th day of June, 1895, it being still the May, 1895, Term of said Court, your petitioner duly filed its motion in said cause, to vacate and set aside said judgment and for a new trial, for the several reasons in said motion stated.

IV. Said motion for a new trial was entertained by the Court, was duly presented on its merits by counsel for the respective parties, and thereupon at the November, 1895, Term of said Court, and on the 11th day of December, 1895, the following entry was made in said case, to-wit:

"THE WESTERN MANUFACTURING COMPANY,

vs. 226—Q.

"KINGMAN & COMPANY.

"This cause having been heard on the motion of the de-
"fendant to set aside the judgment and the verdict, and for a
"new trial herein, was argued and submitted to the Court by
"the attorneys for the respective parties, whereupon after
"careful consideration thereof, and being fully advised in the
"premises, it is now on this day considered, ordered and ad-
"judged by the Court that the said motion be and the same is
"hereby overruled, and that the judgment heretofore entered
"herein, be and remain absolute."

V. On the next day after the above order overruling said motion, an order was entered giving your petitioner thirty

days from that date, December 12th, in which to prepare and present its bill of exceptions.

VI. Your petitioner prepared its bill of exceptions which was duly served on the attorneys for The Western Manufacturing Company and was by them "Dec. 30, 1895, returned without amendment," was presented to the trial judge for his signature January 9th, 1896, and was by said judge allowed and filed January 11th, 1896.

VII. Your petitioner's Petition for Writ of Error, Assignment of Error, Bond on writ of Error, were filed, the bond approved, and the Writ of Error duly allowed, all on January 20th, 1896. The citation was duly issued, served, returned, and filed January 22d, 1896. The record was filed in the Court of Appeals March 14th, 1896, and was duly printed.

VIII. Thereafter and on the 1st of May, 1896, The Western Manufacturing Company filed its motion in the Court of Appeals which, omitting the caption, was as follows:

"Comes now the defendant, The Western Manufacturing "Company, and moves the Court for an order dismissing this "appeal for the following reasons:

"1st. Because the Court has no jurisdiction of the said "cause.

"2nd. Because more than six months intervened be-"tween the date of the rendition of the judgment in said "action and the date of allowing and taking out the writ of "error in said cause.

"3rd. Because more than six months intervened be-"tween the date of the rendition of judgment in said cause "and the filing of any assignments of error in said cause in "the Circuit Court.

"4th. Because more than six months intervened be-

"tween the date of the entry of judgment in said cause and "the filing of the petition for writ of error in said cause in "the Circuit Court.

"5th. Because more than six months intervened be- "tween the date of the entry of the judgment in said cause "and the time of filing the supersedeas bondin said cause.

"6th. Because more than six months intervened be- "tween the time of the entry of judgment in said cause and "the showing of citation therein.

"WALTER J. LAMB,
"*Atty. for the Western Mfg. Co.*
"Defendant in Error."

IX. Said cause duly came on to be heard on the foregoing motion. May 21st, 1896, the motion was sustained, and the writ or error "was dismissed with costs for want of jurisdiction." Your petitioner duly filed a petition for a rehearing of said motion, but a rehearing was denied by an order entered September 21st, 1896, and upon motion of counsel for your petitioner an order was duly entered staying mandate until the first Monday in November, 1896.

A certified copy of the entire record of the said case in said Circuit Court of Appeals in pursuance of which said order of dismissal was made, is herewith furnished, as a part of this application, in conformity with Rule 37 of this Honorable Court relative to cases from Circuit Courts of Appeals.

X. The question thus presented by the record in the case of your petitioner was and is, Whether the time for suing out a writ of error for the review of a judgment in an action at law, in those districts where it is customary to enter judgment at once on the return of the verdict and to entertain and rule upon motions for new trials when they are filed within three days after the entry of the judgment, commences to run from the date of the entry of the judgment, or from the date of the

order overruling the motion for a new trial. The said Circuit Court of Appeals held that the time for suing out the writ of error commenced to run on the date of the entry of the judgment; whereas your petitioner is advised and believes and humbly submits that the judgment is not final until the motion for a new trial is overruled, and that therefore the time for suing out the writ of error commences to run on the latter date. And your petitioner is advised and believes that the said judgment of the said United States Circuit Court of Appeals in said case is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination of said order dismissing said writ of error, under and in conformity with the provisions of the sixth section of the Act of Congress entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, the said case being made final in the said Circuit Court of Appeals by the said Act.

XI. By the eleventh section of the act establishing the Circuit Courts of Appeal, it is provided, that no appeal or writ of error shall be taken of sued out except within six months after the entry of the judgment or decree sought to be reviewed. Thus, the time for taking an appeal and for suing out a writ of error is the same, regulated by the same section of the same act, in the same language.

XII. Your petitioner is advised and believes and humbly submits that there is no distinction between the effect of a motion or petition for a rehearing in a suit in equity, and a motion for a new trial in an action at law, that is seasonably made and entertained by the court. This Honorable Court has often held that when a motion or petition for rehearing was seasonably made in a suit in equity and entertained by the court, the time for appeal did not begin to run until the mo-

tion or petition was disposed of; for that until then the decree did not take final effect for the purpose of the writ of appeal.

Northern Pacific Railroad Co. v. Holmes, 155 U. S., 137.

Voorhees v. Manufacturing Co., 151 U. S., 135.

Aspen Mining & Smelting Co. v. Billings, 150 U. S., 31.

Texas & Pacific Railway Co. v. Murphy, 111 U. S., 488.

Goddard v. Ordway, 101 U. S. 745.

Memphis v. Brown, 94 U. S., 715.

Slaughter House Cases, 10 Wall., 273.

Brockett v. Brockett, 2 How., 238, 249.

In *Aspen Mining & Smelting Company v. Billings*, *supra*, your Honors stated the rule in the following language:

"The rule is, that if a motion or a petition for rehearing "is made or presented in season and entertained by the court, "the time limited for a writ of error or appeal does not begin "to run until the motion or petition is disposed of. Until then "the judgment or decree does not take final effect for the pur- "pose of the writ of appeal."

XIII. Your Honors do not seem to have deemed it necessary that the motion or petition should be disposed of at the term at which the judgment or decree was entered, for in most, if not all, of the cases above referred to, the motion or petition was not disposed of until a term subsequent to the term at which the judgment or decree was entered. Apparently the rule is without qualification, that the motion suspends the judgment so that it does not become final until the motion is disposed of.

XIV. On this question there is not merely an apparent difference of opinion between this Honorable Court and the

Honorable the Court of Appeals for the Eighth Circuit, but also between the Court of Appeals for the Eighth Circuit and the Fifth and First Circuits.

In *Louisville Trust Company v. Stockton*, 18 C. C. A., 408, Fifth Circuit, error to the Circuit Court of the United States for the Southern District of Florida, "the judgment in the court below was rendered on the 1st day of May, 1895," which was the February 1895 term of said court, and thereupon a motion for a new trial was entered, which was overruled at the May 1895 term of said court, on the 2nd of June of said term. "The citation directing the defendant in error to answer in this court was signed and issued on the 9th day of November, 1895, more than six months after the entry of the judgment sought to be reviewed, but within six months from the date when the motion for new trial was overruled." A motion was made to dismiss the writ of error because it had not been sued out until more than six months after the entry of the judgment. The motion was overruled because "the time limited for suing out a writ of error does not begin to run while there is a motion for a new trial pending."

Andrews v. Thum,, 18 C. C. A., 566, First Circuit, appeal from the Circuit Court of the United States for the District of Massachusetts, was sought to be dismissed because the appeal was not taken within six months from the entry of the decree, but the motion was overruled, because the "decree was suspended by a motion for rehearing, and did not take effect and become operative till that motion was overruled."

XV. The importance and gravity of this question arises not merely from the fact that it is a question of jurisdiction, but also from the further fact that it is and has been the practice in the Circuit Court for the District of Nebraska, and as your petitioner is informed and believes, is and has been the practice in actions at law in the Circuit Court for every District

in the Eighth Circuit, except the District of Minnesota, to file a motion for a new trial as was done in this case, and to defer proceedings in review until after the motion was disposed of. It is likely that this same practice prevails in other Circuits than the Eighth. Your petitioner is advised and believes that this has been deemed the proper practice by the bench and the bar of the districts where it prevails in this Circuit. So that if the judgment of the Court of Appeals in this case is correct, is it not likely that there are numerous cases appearing to have been finally adjudicate on their merits in the Court of Appeals, wherein in fact that Court was without jurisdiction thereof?

Again. The decisions of this Honorable Court on this question have been for the most part, your petitioner believes have been exclusively, in appeal cases. In view of the diversity of decision in the different Circuits in respect of writs of error, your petitioner respectfully submits that it is manifestly in the interest of jurisprudence and uniformity of decision that the question of the just construction of the eleventh section of the Act Establishing Circuit Courts of Appeals, in respect of the date upon which in actions at law wherein after entry of judgment on the return of the verdict a motion for a new trial is seasonably filed and entertained by the court, should be authoritatively and finally adjudged by this Honorable Court, upon and after a full presentation to the Court of the merits of said question on the part of your petitioner and its adversary herein.

Wherefore your petitioner respectfully prays that a Writ of *Certiorari* may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eight Circuit, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in the said case therein, en-

titled, Kingman & Company, plaintiff in error, *versus* The Western Manufacturing Company, defendant in error, number 763, to the end that the judgment of said court dismissing said writ of error may be reviewed and determined by this court, as provided in Section 6 of the Act of Congress establishing Circuit Courts of Appeals, or that your petitioner may have such other or future relief or remedy in the premises as to this court may seem appropriate, and in conformity with said Act, and that the said judgment of the said Circuit Court of Appeals in the said case, and every part thereof, may be reversed by this Honorable Court, and that said Circuit Court of Appeals may be directed to reinstate said writ of error and cause the same to be set down for hearing on its merits.

And your petitioner will ever pray, etc.

KINGMAN & COMPANY,

By .....

Attorney and Counsel for Petitioner.

OF COUNSEL:

STATE OF NEBRASKA, }
DOUGLAS COUNTY. } ss.

James H. McIntosh, being duly sworn, says that he is one of the attorneys and of counsel for Kingman & Company, the petitioner above named, and as such had personal charge for it of the case in the foregoing petition mentioned in the Circuit Court of the United States for the District of Nebraska, and in the United States Court of Appeals for the Eighth Circuit; that he has read the foregoing petition; and that the facts therein stated are true to the best of his information and belief.

.....

Subscribed and sworn to before me this 16th day of October, 1896.

Notary Public.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 248.

KINGMAN & COMPANY,
Plaintiff in Error.
vs.
THE WESTERN MANUFACTURING COMPANY,
Defendant in Error.

Brief for Plaintiff in Error.

On Writ of Certiorari to the United States Circuit Court of Appeals, for the Eighth Circuit.

JAMES H. McINTOSH,
Attorney for Plaintiff in Error.

STATEMENT OF THE CASE.

Brief Statement of the Issue.

May it please the Court:

This cause comes into this court on a writ of *certiorari*, directed to the United Circuit Court of Appeals for the Eighth Circuit, to review the judgment of that court, dismissing the plaintiff in error's writ of error for want of jurisdiction.

The question involved herein is, whether the

time for suing out a writ of error to the United States Circuit Court of Appeals, pursuant to the 11th Section of the Act of March 3rd, 1891, for the establishment of Circuit Courts of Appeals, for the review of a judgment in an action at law in those districts where it is customary to enter judgment at once upon the return of the verdict, and to entertain and rule upon motions for new trials when they are filed within three days after the entry of the judgment, commences to run from the date of the entry of the judgment, or from the date of the overruling the motion for a new trial. The Circuit Court of Appeals for the Eighth Circuit held in this case that the time for suing out the writ of error commences to run from the date of the entry of the judgment, and not from the date of the order overruling the motion for a new trial which was seasonably filed and entertained by the court, and therefore they dismissed this cause for want of jurisdiction. If it is true that the time for suing out the writ of error commences to run in such case from the date of the judgment, and not from the date of the overruling of the motion for a new trial, then the order of the Circuit Court of Appeals for the Eighth Circuit dismissing this writ of error was correct. If, however, the time for suing out the writ of error commences to run from the date of the overruling of the motion for a new trial which was seasonably filed and entertained by the court, then the judgment of the Circuit Court of Appeals in dismissing this writ of error was erroneous.

The Manner in Which This Question Arises.

The defendant in error, The Western Manufacturing Company, a resident and citizen of the State and District of Nebraska, duly prosecuted a suit against the plaintiff in error, Kingman & Company, a resident and citizen of the State, and Northern Disrict, of Illinois, in the Circuit Court of the United States for the District of Nebraska; and such proceedings were had therein that said cause duly came on for trial before a jury at the May, 1895, term of said court, resulting in a verdict on the 4th day of June, 1895, of said term, against the plaintiff in error, for the sum of $1996.66. On the coming in of said verdict the court, according to its established custom in jury trials, at once rendered judgment on said verdict. Record, page 24. Page 25.

Within three days after the recording of said verdict and judgment, and on the 6th day of June, 1895, it being still the May term of said court, the plaintiff in error filed its motion in said cause to vacate and set aside said judgment, and for a new trial, for the several reasons in said motion stated. Page 25.

Said motion for a new trial was entertained by the court, was duly presented on its merits by counsel for the respective parties, and thereupon, at the November, 1895 term, of said court, and on the 11th day of December, 1895, was overruled, pursuant to the following order that day entered:

"THE WESTERN MANUFACTURING COMPANY,
vs.
'KINGMAN & COMPANY. } 226 Q.

"This cause having been heard on the motion

"of the defendant to set aside the judgment and "the verdict, and for a new trial herein, was argued "and submitted to the court by the attorneys for "the respective parties; whereupon, after careful "consideration thereof, and being fully advised in "the premises, it is now on this day considered, "ordered and adjudged by the court that said mo- "tion be, and the same is hereby, overruled, and "that the judgment heretofore entered herein be "and remain absolute."

On the next day after the order overruling the motion for a new trial, an order was duly entered, giving the plaintiff in error thirty days from that date, December 12th, in which to prepare and present its bill of exceptions.

The bill of exceptions was duly served on the attorneys for the defendant in error, and was by them "December 30th, 1895, returned without amendment," was presented to the trial judge for his signature January 9th, 1896, and was by said judge duly allowed, and was filed January 11th, 1896.

The plaintiff in error's petition for writ of error and assignment of error were filed, the bond approved, and the writ of error duly allowed, all on January 20th, 1896.

The citation was duly issued, served, returned and filed January 22nd, 1896. The record was filed in the Court of Appeals March 14, 1896, and was duly printed.

Thereafter, and on the 1st day of May, 1896, the defendant in error filed its motion in the Cir-

cuit Court of Appeals, which, omitting the caption was as follows:

"Comes now the defendant, the Western Man-"facturing Company, and moves the court for an "order dismissing this appeal for the following "reasons:

"1st. Because the court has no jurisdiction of "the said cause.

"2nd. Because more than six months inter-"vened between the date of the rendition of the "judgment in said action and the date of allowing "and taking out the writ of error in said cause.

"3rd. Because more than six months inter-"vened between the date of the rendition of judg-"ment in said cause, and the filing of any assign-"ment of error in said cause in the circuit court.

" 4th. Because more than six months inter-"vened between the date of the entery of judgment "in said cause and the filing of the petition for writ "of error in said cause in the circuit court.

"5. Because more than six months intervened "between the date of the entry of the judgment in "said cause and the time of filing the supersedeas "bond in said cause.

"6th Because more than six months inter-"vened between the time of the entry of judgment "in said cause and the showing of citation therein.

"WALTER J. LAMB,
"*Attorney for the Western Mfg. Co.,*
"*Defendant in Error.*" Page 113.

Said cause duly came on to be heard on the fore-going motion. The motion was sustained May 21st,

1896, and the writ of error was dismissed with costs,
114. for want of jurisdiction. A petition for a rehearing of said motion was duly filed, but a rehearing was denied by an order entered September 21st, 1896, and upon motion of counsel for plaintiff in error an order was duly entered staying mandate
123. until the first Monday in November, 1896. Pursuant to the prayer of the petition of the plaintiff in error your Honors caused a writ of *certiorari* to issue herein, under date of the 28th of October, 1896, removing said cause into this court.

ERRORS RELIED UPON.

It was error to have dismissed this writ of error out of the Circuit Court of Appeals for want of jurisdiction, for the motion for new trial was seasonably and properly filed and the judgment in said cause did not become final until the motion for a new trial was disposed of. The writ of error was taken and sued out within six months after the entry of the order overruling the motion for a new trial, as required by the 11th Section of the act creating Circuit Courts of Appeals, and therefore the Circuit Court of Appeals had jurisdiction to review the judgment of the Circuit Court.

BRIEF OF THE ARGUMENT.

No written opinion of the Circuit Court of Appeals was filed in passing upon the defendant in error's motion to dismiss. Arguments, however, in support of the following points, received favorable consideration, to wit: That there is no such thing known to the Federal practice as a motion

for a new trial; that the Federal Statute, Section 987, provides a method of procedure in applying for a new trial in an action at law, and that that procedure is exclusive; that in view of said Section 987 the only method by which a new trial can be obtained is, not by motion, but by petition, which can only be filed with leave; that the application for a new trial in this case having been by motion, filed without leave of court, and not by petition filed with leave of court as the statute requires, was ineffectual for any purpose; and that therefore the judgment was final on the date of its entry, which was more than six months before the writ of error herein was taken or sued out.

First Point.

The filing of a motion for a new trial, as was done in this case, was proper procedure.

(*a*) In the judiciary act of 1789, it was provided that "all of said courts shall have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in courts of law."

Revised Statutes of United States Sec. 726.

At the time this statute was passed, the remedy by motion for a new trial was and long had been a well recognized common law remedy. The motion was made as a matter of right without leave or limitation, except that it "must be made within the first four days of the next succeeding term, within which term it is usually heard and decided."

III Cooley Blackstone, 3rd Ed. 391.

(*b*) The practice and mode of procedure existing at the time of this transaction in like cases in

the courts of record in the state of Nebraska were regulated by the following statute:

"The application for a new trial must be made "at the term when the verdict, report or decision "is rendered, and except for the cause of newly "discovered evidence, material for the party ap- "plying, which he could not with reasonable dili- "gence have discovered and produced at the trial, "shall be within three days after the verdict or de- "cision was rendered, unless unavoidably pre- "vented."

Compiled Statutes of Nebraska, 1897, sec. 5089.

Whether or not this state statute comes within the meaning of section 914 of the Revised Statutes of the United States, it is not necessary here to consider. It is sufficient, I think, that it has been the usage and practice of the bar of the Federal Courts for the District of Nebraska to file a motion for a new trial, as was done in this case, within three days after the entry of the judgment. This is at least after the analogy of the state practice. The courts for this district have always, without exception, recognized this as proper practice, have uniformly entertained and acted upon such motions, sometimes sustaining and sometimes overruling them; and in such cases the usage and practice of the particular court is entitled to be considered.

Shoby vs. Foot, 20 How., 290-295.

(c) There never have been any written rules promulgated by the United States Circuit Court for the District of Nebraska. The filing of a motion for a new trial as was done in this case was one of the unwritten rules of the court, recognized both by the bench and bar as an established form

of procedure of the court. And I submit such a rule is valid, under the authority of section 918 of the Revised Statutes giving the Circuit Courts power to make rules and orders regulating their own practice.

The rules of the Circuit Court for the southern district of New York, and for the northern district of Vermont, and for the District of Columbia, relating to motions for new trials, have never been questioned, and yet they are each quite as much outside the letter of a federal statute as the rule prevailing in the Circuit Court for the District of Nebraska, allowing, pursuant to, or after the analogy of the state practice, such a motion to be filed at any time within three days after the entry of the judgment.

Blatchford, Rules and P... tistics of Uni... States Cou... 406, 652, 654, 5...

(*d*) Motion for a new trial is spoken of and recognized as a customary, proper, and established form of procedure of this court.

Marine Ins. Co. v. Young, 5 Cranch, 186, (1809).

Henderson v. Moore, 5 Cranch, 11, (1809).

Blunt v. Smith, 7 Wheat., 248, (1822).

Lanahan v. Ins. Co., 1 Pet., 170, (1828).

United States v. Buford, 3 Pet., 12. (1830).

New York Life Ins. Co. v. Wilson, 8 Pet., 291, (1834).

Boswell v. De Le Lanza, 20 How., 29, (1857).

Warner v. Morton, 20 How., 448, (1857).

Insurance Co. v. Barton, 13 Wall., 603 (1871).

Railway Co. v. Heck, U. S., 120, (1880).

(e) Motion for a new trial is the only remedy in certain cases.

Mulhall v. Keenan, 18 Wall., 342.

Babcock v. City 3 Wall., 240.

(f) Remedy by motion for new trial is a common law remedy, existing probably independent of statute, and is an incident to the general powers of the court. It is a convenient and useful general remedy guaranteed by Section 726 above quoted. Its convenience and general usefulness as a form of relief are not intended to be impaired or curtailed by Section 987 of the Revised Statutes. That section is supplementary to the usual remedy by motion, and enlarges the rights of the defeated party when he invokes the privileges by it conferred. Perhaps it will be convenient if I quote the section:

vs. Evi-
18 Fed.,

"Section 987. When a Circuit Court enters "judgments in a civil action, either upon a verdict "or on a finding of the court upon the facts, in "cases where such finding is allowed, execution "may on motion of either party, at the discretion "of the court, and on such conditions for the se-"curity of the adverse party as it may judge proper, "be stayed 42 days from the time of entering "judgment, to give time to file in the clerk's office "of said court a petition for a new trial. If such "petition is filed within said term of 42 days, with a "certificate thereon of any judge of said court, that "he allows it to be filed, which certificate he may "make or refuse at his discretion, execution shall "as of course be further stayed to the next session

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'of said court. If a new trial be granted, the "former judgment shall thereby be rendered void."

The objects and effect of this section are threefold: (1.) To confer upon the Courts the power to extend the time for the preparation for the application for a new trial; (2.) To carry the case over, if need be, into the succeeding term, and thus to allow the defeated party to file his petition for a new trial at the term after the one at which the judgment was entered, if the judgment was entered so near the end of the trial term that the motion for a new trial could not properly be prepared and filed before the term ended; (3.) To stay execution until the question as to whether or not the judgment ought to stand can be determined.

The foregoing was evidently MR. CIRCUIT JUDGE MCCRARY'S view, for in speaking of the effect of said section 987, MR. CIRCUIT JUDGE MCCRARY, said:

Rutherford v. Penn. Mutual Life Ins. Co., Fed. Rep., 455.

"Now, this is not the only section under which "the party can apply for a new trial. His right to "apply is independent of this section. This pro- "vides for a case where he desires to obtain from "the Court an extension of the usual time within "which to make his application for a new trial; and "in that case, where he gets such time merely to "apply, he must show that he has presented his "petition, and that it has been allowed in accord- "ance with the provisions of the section; but if he "makes his motion for a new trial, without asking "for time, then he can make it independent of sec- "tion 987, and is not bound by the provisions of

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"that section. In other words the court had a per-
"fect right to entertain the motion for a new trial,
"it did entertain it, and suspended the execution
"until it should be determined."

vs. Spiro, d. 576.

MR. CIRCUIT JUDGE TAFT, in a late case (February, 1897), refers to the filing of a motion for a new trial, not as a matter of leave, but as a matter of right, under section 726 of the Revised Statutes, and says that section 987 "relates only to the "method of staying execution pending new trial, "and does not limit the time in which motions for "new trials may be otherwise filed."

Section 987 and the section following it, are the only provisions in the federal statutes for the stay of execution. One provides for a stay when it is doubtful whether or not the judgment ought to stand; the other provides for a stay when the state laws in the state where the court is held does the like.

Second Point.

The motion in this case, although called a motion, possesses all the requisites of a petition, and is substantially a petition.

r vs. Jones, et. (Mass.).

Besides, if the pleading was defective in form, the defect was waived by going to hearing on it. The court regards the substance of the thing, and not the form. MR. CIRCUIT JUDGE PUTMAN lately said: "The motion filed May 6th, 1893, and heard "after the entry of the decree of May 13th, 1893, "must be regarded as in effect the same as a peti-"tion for a rehearing, filed after judgment under "rule 29. It was heard on its merits without ob-

e Ws vs. n, 61 Fed. 149.

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'jection, and can have no other possible effect. It "was entirely lacking in form, but in the Federal "Courts when substance is preserved, defect of "form is easily waived as was done in this case."

Third Point.

Leave to file a motion for a new trial is not required. It may be filed pursuant to the general statute and practice of the courts, unless there is a rule to the contrary. If leave to file, however, were necessary, it will be presumed in this case that leave was granted.

The motion was entertained by the court. The parties treated it as properly filed. The recital of the record is that "it was argued, and submitted to the court by the attorneys for the respective parties." Page 29.

It would be a fair test of the effect of the failure of the record affirmatively to show that the motion was filed with leave, to consider that as the only question in the case. Assume that the statute provided that the judgment should not be deemed final until the overruling of the motion for a new trial that was filed with leave of court, and the record came up not showing leave to file the motion, but showing that the motion was seasonably filed, was argued and submitted to the court by the attorneys for the respective parties, and was carefully considered by the court. What would your Honors say in response to a motion to dismiss the writ because the record did not show that the motion was filed with leave? Similar cases have often occurred, and have always been controlled

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by the general maxim, *omnia praesumuntur rite esse acta.*

Fourth Point.

The recitals of this record show that this motion and the consideration of it by the court were in all things regular.

The recitals of the order overruling the motion are that "this cause having been heard on the "motion of defendant to set aside the judgment and "the verdict and for a new trial herein, was argued, "and submitted to the court, by the attorneys for "the respective parties, whereupon, after careful "consideration thereof, and being fully advised in "the premises it is now on this day considered" &c.

29.

If it were necessary in order to give effectiveness to a motion for a new trial to show that it was entertained by the court in the first instance, or if it were necessary that such a motion should be argued and submitted during the trial term, the court here would presume from the foregoing recital in the order overruling the motion that all necessary steps to give validity and effectiveness to the motion had been taken; that the procedure was in all respects regular, the record nowhere showing the contrary.

U. S. 31.

In *Aspen Mining & Milling Co. v. Billings* it was urged that the appeal was taken too late, because it did not affirmatively appear that the petition for rehearing was filed during the term at which the decree was entered, or was entertained by the court. But in answer to that contention Mr. Chief Justice Fuller giving the opinion of

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this court, said: "But it is said this cannot be the "result under either statute or rule, of the mere "filing of a motion or petition for rehearing, and 'that it does not affirmatively appear in this case "that the motion or petition was entertained by the "court. But we should be inclined to hold, if a "decision in that regard were called for, that since "the application was passed upon as having been "duly made, the presumption must be indulged "that it was entertained by the court in the first "instance, and during the term at which the decree "was pronounced."

Fifth Point.

Taking this record, therefore, as it is, with the presumptions created by its recitals and that otherwise obtain with relation to the regularity of the proceedings of the court, it must be concluded,—the record itself affirmatively shows the fact to be,—that this motion was duly made and presented in season, and was entertained by the court. Therefore the time limited for a writ of error did not begin to run until the 11th day of December, 1895, the day on which the motion for a new trial was disposed of. Until then the judgment did not take final effect for the purposes of the writ of error in this case. Hence, the plaintiff in error was in time when it sued out its writ of error on the 20th day of January, 1896, less than two months after the judgment in the suit became final by the overruling of the motion for a new trial. Such seems to be the established construction by this court of this and like statutes.

Your Honors in the late case of *Aspen Mining*

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U. S. 31.

Milling Company v. Billings, fully considered this question. In that case the decree was entered October 20th, 1890, one of the days of the May Term, 1890, of the Circuit Court for the District of Colorado. A motion for a rehearing was filed October 25th, 1890. The November term commenced November 4th, 1890, and adjourned March 20th, 1891. "On April 26th, 1891, the complainants "filed in the case a request for decision on the mo- "tion for rehearing, which recited that the motion "had been submitted in open court at the beginning "or very early in the last term. The May Term, "1891, opened on the first Tuesday, being the 5th "day of May, 1891, and on that day the record re- "cited that 'the motion for a rehearing of this cause "having heretofore come on to be heard, and hav- "ing been submitted on proofs, the court being suf- "ficiently advised, denied the motion.'" On July 2nd, 1891, one of the days of the May term, 1891, of the court, complainants prayed an appeal to the United States Circuit Court of Appeals, for the Eighth Circuit, which was allowed. The citation was issued August 15th, 1891, and duly served.

Such being the dates and facts of the case, what did your Honors say about it? Inasmuch as I deem that decision of great importance in the present controversy, I beg to quote in full the decision of the court, by MR CHIEF JUSTICE FULLER, on this point, omitting only the last paragraph thereof, which is quoted at the end of the last above paragraph of this brief, to-wit:

"The decree dismissing complainant's bill was "entered on October 20th, 1890, but an applica- "tion for a rehearing was made shortly thereafter,

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"and during the same term, but not disposed of
'until May 5th, 1891.

"*The rule is, that if a motion or a petition for*
"*rehearing is made or presented in season and enter-*
"*tained by the court, the time limited for a writ of*
"*error or appeal does not begin to run until the motion*
"*or petition is disposed of. Until then the judgment*
"*or decree does not take final effect for the purpose of*
"*the writ of appeal. Brockett v. Brockett*, 2 How.,
"238, 249; *Texas & Pacific Railway v. Murphy*, 111
"U. S., 488; *Memphis v. Brown*, 94 U. S., 715.

"If this case falls within that category, then
"the six months within which the appeal had to be
"taken under Section 11 of the Judiciary Act of
"March 3rd, 1891, did not commence to run until
"May 5th, 1891, and the appeal was in time.

"It is true that equity rule 88 provides that no
"rehearing shall be granted after the term at which
"the final decree of the court shall have been
"entered and recorded if an appeal lies to the Su-
"preme Court; but if this petition for rehearing
"was filed in season and entertained by the court,
"then the decree, although entered in form, did not
"discharge the parties from their attendance in
"the cause, and they were bound to follow the pe-
"tition thus pending to the next term. The suit
"was thereby prolonged until the application was
"disposed of in the regular course of proceedings.
"This is expressly so ruled in *Goddard v. Ordway*,
"*supra*.

"In *Giant Powder Co. v. California Vigorit*
"*Powder Co.*, 5 Fed. Rep., 197, S. C. 6 Sawyer, 508,
"it was said by MR. JUSTICE FIELD that equity rule

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'88 applies only where no petition is presented "during the term, and the numerous cases in which 'it has been held that the time limited for an ap- "peal does not begin to run until a petition for a "rehearing properly presented has been disposed "of, sustain that view. The decree does not, in "legal effect, remain final while the petition is pend- "ing, and the prescription of rule 88 must be con- "strued to mean that a rehearing cannot be granted "after the lapse of the term, unless application is "made therefor during the term, and being duly "entertained, the decree is hereby prevented from "passing beyond the control of the court. *The en- "tertaining of the petition keeps the jurisdiction alive.* "and the granting of the rehearing may be made "absolute or denied thereafter, as the court may "determine."

When this subject next came up for consider- ation, your Honors held that the appeal could not be taken from the decree while the motion for a rehearing was pending, and that "the taking of a "new appeal becomes necessary upon the denying "of the rehearing."

hees vs. nufacturing 151 U. S., 135.

Still later, your Honors again held that when a motion for rehearing "is made or presented in "season, and entertained by the court, the time "limited for a writ of error or appeal does not be- "gin to run until the motion or petition is disposed "of. Until then the judgment or decree does not "take final effect for the purpose of the writ of "error or appeal."

bern Pacific Road Co. vs. nes, 155 U. 37.

The rule your Honors have thus so specifically stated and reiterated gives expression, and is re-

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sponsive, to the decisions and practice and procedure of this court from a very early date.

In *Brockett v. Brockett*, a final decree was entered on the 10th of May. On the 26th of the same month a petition was filed to have the final decree opened for certain purpose. The court took cognizance of the proceedings, and referred them to a master commissioner. The commissioner filed his report on the 9th of June, but the court then refused to open the decree. Under the statute in force at that time an appeal might operate as a supersedeas if taken and the appeal bond filed within ten days, Sundays excepted, after the entry of the final decree. On the question therefore, as to whether or not the ten days commenced to run after the overruling of the petition on June 9th to open up the decree for certain purposes, MR. JUSTICE STORY said: "Now the argument is, that as "the original degree was rendered more than one "month before the appeal, it could not operate, "under the laws of the United States as a *supersedeas*, or to stay execution on the decree, and be- "cause to have such an effect the appeal should be "made, and the bond should be given within ten "days after the final decree. But the short and "conclusive answer to this objection is, that the "final decree of the 10th of May was suspended by "the subsequent action of the court, and it did not "take effect until the 9th of June, and that the ap- "peal was duly taken, and the appeal bond given, "within ten days from this last period." 2 How., 258 (1844).

In the *Slaughter House Cases*, MR. JUSTICE CLIFFORD said: "Filed as the writs of error were with- 10 Wall., 273.

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"in ten days from the date of the entry refusing "the petition for rehearing, it is claimed by the "plaintiffs that the several writs of error operate as "a *supersedeas*, and stay execution under the 23rd "section of the Judiciary Act. Doubts were at one "time entertained upon that subject, but since the "decision in the case of Brockett v. Brockett, the "question must be considered as settled in accord- "ance with the views of the plaintiffs."

U. S., 715. In *Memphis v. Brown*, MR. CHIEF JUSTICE WAITE said: "Under the ruling in Brockett v. "Brockett, 2 How., 241, the motion made during the "term, to set aside the judgment of March 2nd, "suspended the operation of that judgment, so that "it did not take effect for the purposes of a writ of "error until May 20th, when the motion was dis- "posed of."

U. S., 745. In *Goddard v. Ordway*, a motion was made and entered on the minutes to vacate the affirmance of the decree, and grant a reargument. Nothing further was done at that term of court. It was held that the motion prolonged the suit, and the parties thereto were in court until it should be finally disposed of. The Court there said: "A "paper may be filed in the proper office, and yet "not brought to the attention of the court while "sitting in judgment, but when what it calls for "appears on the minutes of the actual proceedings, "it must be presumed that the court, in some form, "gave it judicial attention, and that it was pre- "sented in some regular way. In the Supreme "Court of the District as we are advised if any "matter in hand is not disposed of at one term, it "is deemed to have been continued to the next.

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"Whatever parties are bound to take notice of one "term, they must follow to the next, if they are not, "in some appropriate form dismissed from further "attendance. In this case, the motion for reargu- "ment went over as unfinished business, and carried "the parties with it. The proceeding was, in all "material respects, like a motion for a new trial, "filed in time at one term, and not disposed of "until the next. Under such circumstances, a "judgment or decree, although entered in form "does not discharge the parties from their attend- "ance on the cause. They must remain until all "questions as to finality of what has been done are "settled. The motion, when entertained, prolongs "the suit, and keeps the parties in court until it is "passed upon, and disposed of, in the regular "course of proceeding."

In *Texas & Pacific Railroad Co. v. Murphy*, the judgment was entered May 29th, 1883. A motion for a rehearing was made, and was decided December 21st, 1883. The question was, within what time did the sixty days, within which to sue out and serve the writ of error, for the purpose of a *supersedeas*, commence to run? It was held that the time limited for the writ of error did not begin to run until the motion for a rehearing was disposed of, and that the sixty days commenced to run after the latter date, the Court saying: "It was "expressly ruled in Brockett v. Brockett, which has "been followed in many cases since, that if the peti- "tion for rehearing is presented in season, and en- "tertained by the court, the time limited for an ap- "peal or writ of error does not begin to run until "the petition is disposed of. Slaughter House

111 U. S. 488.

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"Cases, 10 Wall., 273, 289; Memphis v. Brown, 94 "U. S., 715, 717. The motion for a rehearing in "this case was not decided until December 21st, "and the writ of error was sued out, and served, "within sixty days thereafter. This was in time to "secure the supersedeas."

This long, uniform holding of this court is certainly high authority for the proposition I am here urging, unless the effect of a motion for a rehearing in a suit in equity can in some way be distinguished from the effect thereof in an action at law. But the practice act provides, section 1012, that appeals from the circuit courts shall be subject to the same rules, regulations, and restrictions as are, or may be prescribed in cases of writs of error. Appeals and writs of error could not be subject to the same rules, regulations and restrictions, if the time for taking an appeal were six months after the overruling of a motion for a rehearing in an equity suit, and not within six months after the overruling of a motion for a new trial in an action at law.

In Section 11, relating to the time for taking appeals and writs of error, of the act creating the United States Circuit Courts of Appeals, appeals and writs of error are put in the same category.

In speaking of the effect of a motion for a rehearing on the time for taking an appeal or writ of error, your Honors have always referred to appeals and writs of error in the same language, and as similiarly affected by a petition for rehearing or a motion for new trial.

Some of the United States Circuit Courts of Appeals, applying the rule on this subject that this

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court has so well established, have retained jurisdiction where the writ of error or appeal was filed within six months from the overruling of the motion or petition for a new trial, although filed more than six months from the date of the entry of the judgment.

In the Fifth Circuit in a late case going up on error to the Circuit Court for the Southern District of Florida, "the judgment in the court below was rendered on the 1st day of May," which was the February, 1895, term of said court; and thereupon a motion for a new trial was entered, which was overruled at the May, 1895, term of said court, on the 2nd of June of said term.

Louisville Trust Company v. Stockston, Fed. 1.

"The citation directing the defendant in error "to answer in this court was signed and issued on "the 9th day of November, 1895, more than six "months after the entry of the judgment sought to "be reviewed, but within six months from the date "when the motion for a new trial was overruled." A motion was made to dismiss the writ of error because it had not been sued out until more than six months after the entry of the judgment. But the motion was overruled, because "the time limited "for suing out a writ of error does not begin to run "while there is a motion for a new trial pending."

In the First Circuit, in a late case, the appellee's motion to dismiss the appeal because the appeal was not taken within six months from the entry of the judgment was overruled, upon the ground that the "decree was suspended by a mo- "tion for rehearing, and did not take effect and be- "come operative until the motion was overruled."

Andrews v. Thum, 72 Fed. 290.

EDGE

CONCLUSION.

From the facts in this record therefore it must be concluded that the filing of the motion for a new trial as was done in this case was proper procedure; that the name given the paper filed cannot impair its effectiveness if it was sufficient in substance to form the basis of an order granting a new trial; that upon this record it must be presumed that leave to file the motion was granted, if such leave were necessary, and that the motion and the court's consideration of it were in all things regular; that the motion having been seasonably made, and entertained by the court, prolonged the suit until the motion "was disposed of in the regular "course of proceedings," and that until then the judgment did not take final effect for the purposes of the writ of error.

If this conclusion is correct, then it follows that the writ of error was sued out in time; that the Court of Appeals had jurisdiction; and that the order dismissing the writ of error was erroneous.

Respectfully submitted,

JAMES H. McINTOSH,

Attorney for Plaintiff in Error.

Omaha, 9 September, 1897.

FILED
MAY 2 189
JAMES H. McKENN

No. 248.

Brief of Lamb for D. C.

248

Filed May 2, 1898.

IN THE

SUPREME COURT

—OF THE—

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH DISTRICT.

KINGMAN & COMPANY,
Plaintiff in Error.

vs.

THE WESTERN MANUFACTURING COMPANY,
Defendant in Error.

WALTER J. LAMB,
Att'y for Defendant in Error.

JAMES H. McINTOSH,
Att'y for Plaintiff in Error.

BRIEF OF DEFENDANT IN ERROR.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

KINGMAN & COMPANY,
Plaintiff in Error.

vs.

THE WESTERN MANUFACTURING COMPANY,
Defendant in Error.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF DEFENDANT IN ERROR.

The printed record fails to show any error in the judgment of the United States Circuit Court of appeals in this cause.

I.

The Court of appeals dismissed the appeal on the motion of this defendant, in which is assigned the following reasons:

1st. Because the Court has no jurisdiction of the said cause.

2nd. Because more than six months intervened between the date of the rendition of the judgment in said action and the date of allowing and taking out the writ of error in said cause.

3rd. Because more than six months intervened between the date of the rendition of judgment in said cause and the filing of any assignments of error in the said cause in the Circuit Court.

4th. Because more than six months intervened between the date of the entry of the judgment in said cause and the filing of the petition for writ of error in said cause in the Circuit Court.

5th. Because more than six months intervened between the date of the entry of the judgment in said cause and the time of filing the supersedeas bond in said cause.

6th. Because more than six months intervened between the date of the entry of judgment in said cause and the issuing of citation therein.

The statute of the United States applicable to the case, Section 11 of the act of March 3, 1891, which created the Court of appeals, and gave it the right to review the judgments of the Circuit Court provides.

"That no appeal or writ of error by which any order, judgment or decree may be reviewed in the Circuit Court of appeals under the provisions of this act, shall be taken or sued out, except within six months after the entry of the order, judgment or decree sought to be reviewed."

26 Statutes 829 & 517.

1 Supp. Rev. Statutes, page 904.

The record shows, that the cause was tried and a verdict rendered at the May 1895 term of the Court, on the 4th day of June, 1895.

That on the same day a judgment was rendered in the cause upon the verdict, and execution awarded thereon in the following language:

JUDGMENT.

Western Manufacturing Company,
vs.
Kingman & Company.
} 226 Q.

The jury in this action having on this day rendered a verdict in favor of the plaintiff and against the defendnat herein for the sum of $1,996.66, on motion of said plaintiff by Lamb, Adams & Scott, its attorneys, it is considered, ordered and adjudged by the Court that said plaintiff is entitled to judgment on said verdict, and that said plaintiff, The Western Manufacturing Company, have and recover of and from
28 Kingman & Company the sum of nineteen hundred ninety-six dollars and sixty-six cents ($1,996.66), together with $.....costs herein expended and that execution issue therefor.

It will be observed that the judgment itself recites:

That it is rendered on the motion of Lamb, Adams & Scott the plaintiff's attorneys.

That the plaintiff is entitled to judgment on said verdict.

That it is formal, final and complete.

That execution is awarded upon it.

On the 6th day of June, a motion for a new trial was filed.

The record shows that nothing further was done in the cause at the May, 1895, term of the Court; that the defendant's attorney did nothing further; That he did not call the attention of the Court to the motion for a new trial; That the Court did not take the matter under advisement or take any further action in the cause during the May, 1895, term.

The Court will also notice that the next term of the Circuit Court for the District of Nebraska, was appointed for and held in Lincoln in October, 1895; that the Court took no action whatever in the cause at that term; nor was it asked to suspend, vacate or modify its judgment at any time.

Finally at the November, 1895, term of Court, on the 11th day of December, 1895, an order was made in the cause overruling the motion for a new trial.

On the 20th day of January, 1896, the assignments of errors and the petition for a writ of error were filed, and the writ of error allowed, and the citation issued, which were returned and filed January 22, 1896.

On the above record the Court of appeals dismissed the appeal.

II.

The record is presumed to show and does show the facts as they existed, that the attention of the Court was not called to the motion for a new trial during the May, 1895 term, nor yet during the October 1895, term, but that the same was submitted and argued on the 11th day of December, 1895; this was at the second term after the judgment was rendered, more

than six months after the date it was entered and after the time to appeal the cause had expired.

Certainly the plaintiff in error could not restore its right to appeal, which it had lost at that time, by calling for action of the Circuit Court upon a motion not recognized under the practice in the Federal Court when any action the Federal Court might take upon it was purely discretionary and not subject to review.

For the purposes of this argument we shall assume that the above record of a judgment in a law action is conclusive of what it unmistakably shows and that it shows the whole of the action of the Court in the premises. Black on judgments volume two section 505-509.

In actions at law unless there is a statute qualifying the effect of judgments, they are final and an estoppel for all purposes, notwithstanding a motion for a new trial is filed, or the pendency of proceedings intended to reverse or suspend their operation. Oregonian Railway Company vs. Oregon Ry. & Nav. Co. 27 Fed. Reporter 277.

The fact that a motion for a new trial is pending and undetermined in no way effects the operation of a judgment therein rendered as an estoppel since such a motion does not operate as a supersedeas or stay execution. Black on judgments vol. two, sec. 512. Young vs. Brehi, 12 Pac. Rep. page 564.

III.

The record shows that the Circuit Court lost jurisdiction over the judgment in this cause at the expiration of the May, 1895 term; this Court has stated the rule applicable, concisely, in the following language:

"It is the general rule of the law that all the judgments, decrees, or other orders of the Courts, however conclusive in their character, are under the control of the Court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified or annulled by that Court. Bronson vs. Schulten, 104 U. S. 410. But it is the rule equally well established, that after the term has ended all final judgments and decrees of the Courts pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them; and if errors exist they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which by law can review the decision."

Phillips vs. Negley 117 U. S. R. 665.

Hickman vs. Fort Scott 145 U. S. R. 415.

IV.

The power to grant new trials in the Courts of the United States is given and limited by the judicial act of 24th September, 1789. It expressly declares in section 17, "that all the said Courts of the United States shall have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the Courts of law, while by section 18 it is enacted, that when, in a Circuit Court, judgment upon a verdict in a civil action shall be entered, execution may, on motion of either party, at the discretion of the Court and on such conditions, for the security of the adverse party, as they may judge proper, be stayed 42 days from the time of entering judgment, to give time to file in the Clerk's office of said Court a petition for a new trial. And if such petition be there filed within said term

of 42 days, with the certificate thereon from either of the Judges of such Court that he allows the same to be filed, which certificate he may make or refuse at his discretion, execution shall, of course, be further stayed to the next session of said Court. And if a new trial be granted the former judgment shall be thereby rendered void."

Chapter 20 first Statute at large. 73.

Now Congress having provided a mode under which at the time judgment is entered upon a verdict in a civil action, execution may be stayed on motion of a party, within the discretion of the Court, rendering the judgment upon giving such security to the adverse party as the judge thinks proper, and fixing 42 days from time of entering the judgment as time to file in the Clerk's office a petition for a new trial, and upon it being filed allowing a further stay of the execution until the next session of said Court, there is no other mode in the Circuit Court under which the absolute finality of the judgment and the plaintiffs right to the execution thereon can be defeated; and the Court is quite without the authority, having entered judgment upon the verdict, after that time to any way qualify it, or stay its effect, or deprive the plaintiff of an execution, except in accordance with the above act of Congress; certainly not after the term at which the judgment is rendered.

V.

Of course, the exception for error in the refusal to grant a new trial, is merely idle after the decisions of this Court, since

The Marion Insurance Company of Alexandria vs. Hodgson, 6th Cranch, 206.

Barr vs. Crath, 4th Wheaton, 213.

Blount vs. B. S. Smith, 7th Wheaton, 248.

Warner vs. Norton, 20th Howard, 448.

and the long line of authorities both in this Court and in the United States Courts of appeals following the foregoing; indeed as early as 1857, in the case of Doswll against De Le Lanza, et al., it is said that the refusal of the Court to grant a new trial is not a proper subject for a bill of exceptions; upon what legal or logical ground then, can it be argued, that the mere filing by counsel of a paper in a case the action of the Court upon which if it is afterward invoked, is purely and altogether discretionary, not subject to exception, bill of exceptions, writ of error or review, can take away the finality of a judgment in an action at law. How is the Circuit Court to know, or the Court of errors to ascertain, that the party filing such a paper ever intended to invoke the action of the trial Court upon it; the very fact that he did not do so until after the time for error or appeal from the judgment had expired, in itself creates a strong presumption against the person filing the motion.

"In regard to motions for new trials and bills of exceptions, Courts of the United States are independent of any statute or practice prevailing in the Courts of the State in which the trial was had."

"The overruling of a motion for a new trial is not a subject of exception according to the practice of the Courts of the United States."

Fishburn vs. Chicago, Milwaukee & St. Paul R. R. Co. 137 U. S. page 60.

Beaupre vs. Noyes, 138 U. S., 397.

M. P. R. R. Co. vs. Chicago & Aiton R. R. Co. 132 U. S. 191.

Newcomb vs. Wood, 97 U. S. page 581.

Indianapolis & St. Paul R. R. Co. vs. Horst, 93 U. S.

The question of the finality of a judgment for the purposes of appeal or error is not effected by state procedure.

Elder vs. McClashy. 70 Federal Rep. 529.

There are several cases, in point with the present, in the Circuit Courts of appeals, where the appeals have been dismissed because more than six months intervened between the date of the rendition of the judgment in the action and the date of allowing and taking out writs of error.

U. S. vs. Baxtor. 51 Federal reporter, 624.

U. P. R. R. Co., vs. Col. Eastern Ry. Co. 54 Federal Reporter, pages 21 & 22.

Condran vs. Chi. M. & St. P. Ry. 67 Fed. Rep. page 1.

VI.

Counsel for the plaintiff in error, in his brief, makes some claim, but what does not very clearly appear, of a common law right under his motion for a new trial; while, of course, it is not needful to combat any such claim, we suggest that the plaintiff in error is not in a position to claim anything under the common law practice relative to new trials.

At common law, when the issue was one of fact, and a verdict was found, the Court for sufficient cause could grant a new trial but judgment could not be entered until the next term after the trial.

Blackstone says:

"If any defect of justice happened at the time, by sur-

prise, inadventure, or misconduct, the party may have relief *in the Court above* by obtaining a new trial."

3 Bl. Comm. (Sharsw. 386.)

Motion had to be made before judgment was signed.

Tidd's Pr. pp. 903-904. 912. 930.

Prior to 1598, any matter alleged as ground for new trial, must appear of record. Afterwards it was granted on the certificate of the judge, that in his opinion the verdict was wrong.

Slades case. Style, 138.

It would seem, that the practice adopted by the Federal statute requiring the certificate of the judge, may have had its origin in the common law practice.

The counsel's appeal, to the supposed practice in Nebraska and to the code of civil procedure of Nebraska as applicable to the case is not more fortunate, as under it final judgment was properly entered when it was.

Chapter four of the code of civil procedure provides,

Chapter IV.—MANNER OF GIVING AND ENTERING JUDGMENT.

Sec. 438. (UPON GENERAL VERDICT.) When a trial by jury has been had, judgment must be rendered by the clerk in conformity to the verdict, unless it is special, or the Court order the case to be reserved for future argument or consideration.

Sec. 439. (UPON SPECIAL FINDING—RESERVED CASE.) Where the verdict is special, or where there has been a

special finding on particular questions of fact, or where the Court has ordered the case to be reserved, it shall order what judgment shall be entered.

Page 1231 of the Revised Statutes of 1897.

The pendency of a motion for a new trial under the Code, does not operate to stay proceedings.

People vs. Louks, 28 California, 70.

Jones vs. Spear, 56 California, 164.

New Trial and Appeal, "Hayne" page 28, Sec. 3.

It is only when there is a statute or rule of Court, and the motion for a new trial is essential to obtain a review of errors occuring at the trial, that it can have any effect to stay final judgment.

Board of Com'rs vs. Gorman, 19 Wallace, 662.

We do not deem it necessary to discuss the cases in equity cited by the plaintiffs counsel, which are regulated by rule 88, under which where a petition in equity for a re-hearing is filed, *and is entertained*, the time in which to appeal does not begin to run until the same is disposed of.

We therefore contend with confidence that the record does not show any error was committed by the Court of appeals in dismissing the appeal in this action.

WALTER J. LAMB.
Attorney for Defendant.

OPINION

KINGMAN v. WESTERN MANUFACTURING COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 248. Submitted May 4, 1898.—Decided May 23, 1898.

A judgment is not final, so that the jurisdiction of the Appellate Court may be invoked, while it is still under the control of the trial court, through the pendency of a motion for a new trial.

THE Western Manufacturing Company, a corporation of the State of Nebraska, brought its action against Kingman & Company, a corporation of the State of Illinois, in the Circuit Court of the United States for the District of Nebraska, seeking a recovery of various amounts, on four causes of action, and demanding judgment in the aggregate for the sum of $18,990. Such proceedings were had that the cause duly came on for trial before a jury at the May term, 1895, of said court, which resulted in a verdict on June 4, 1895, one of the days of that term, against Kingman & Company for the sum of $1996.66. On the coming in of the verdict, the court, according to the practice in that jurisdiction, at once rendered judgment on the verdict. On June 6, 1895, it being still the May term, Kingman & Company filed its motion to vacate and set aside the judgment and for a new trial of the cause, for various reasons therein stated. The motion was heard, and on December 11, 1895, being one of the days of the November term, 1895, of the court, was overruled by an order entered that day in the following terms: "This cause having been heard on the motion of the defendant to set aside the judgment and the verdict and for a new trial herein, was argued and submitted to the court by the attorneys for the respective parties; whereupon, after careful consideration thereof and being fully advised in the premises, it is now on this day considered, ordered and adjudged by the court that said motion be, and the same is hereby, overruled, and

that the judgment heretofore entered herein be and remain absolute."

On the next day, December 12, one of the days of the November term, an order was entered giving Kingman & Company thirty days from that date "in which to prepare and present its bill of exceptions herein."

The bill of exceptions was duly served on the attorneys for the Western Manufacturing Company, and was by them endorsed: "Dec. 30, 1895. Returned without amendment;" was presented to the trial judge for his signature, and was by him duly allowed, signed and filed, January 11, 1896. The petition of Kingman & Company for writ of error and an assignment of errors was filed, the writ of error duly allowed and issued, bond approved and filed, and citation signed, all on January 20, 1896. The citation was served January 21 and returned, and filed January 22. The record was filed in the Circuit Court of Appeals for the Eighth Circuit March 14, 1896, and was printed. On the first day of May, 1896, the Western Manufacturing Company filed its motion in the Circuit Court of Appeals to dismiss the appeal because the court had no jurisdiction of the cause; and because more than six months had intervened between the date of the rendition of the judgment in the action and the date of allowing and taking out the writ of error; of the filing of the petition for the writ of error; of the filing of the assignment of errors; of the filing of the bond; and of the service of the citation. This motion was sustained and the writ of error dismissed, with costs, for want of jurisdiction. A petition for rehearing was denied, and, thereafterward, a writ of certiorari was issued removing the cause to this court.

Mr. Walter J. Lamb for the Western Manufacturing Company.

Mr. James H. McIntosh for Kingman.

Mr. Chief Justice Fuller, after stating the case, delivered the opinion of the court.

Opinion of the Court.

In *Aztec Mining Company* v. *Ripley*, 151 U. S. 79, it was held that this court had jurisdiction by appeal or writ of error to pass upon the jurisdiction of the Circuit Courts of Appeals in cases involving the question whether their judgments were made final by section six of the act of March 3, 1891, c. 517, 26 Stat. 826. The present case was one of the classes of cases in which the judgments of the Circuit Courts of Appeals were made final, and, therefore, the remedy was properly sought by certiorari.

By section eleven of that act it is provided that "no appeal or writ of error by which any order, judgment or decree may be reviewed in the Circuit Courts of Appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment or decree sought to be reviewed."

By section six the Circuit Courts of Appeals are empowered to review final decisions of the District and Circuit Courts, except where cases are carried, under section five, directly to this court, but by the seventh section, as amended by the act of February 19, 1895, c. 96, 28 Stat. 666, jurisdiction is given to the Courts of Appeals from appeals from interlocutory orders in injunction proceedings. *Kirwan* v. *Murphy*, 170 U. S. 205.

This provision is an exception to the general rule, and while the language of section eleven refers to the entry of the order, judgment or decree, yet the meaning must be confined to final orders, judgments or decrees.

The question is, then, whether the judgment of which Kingman & Company complained became final for the purposes of a writ of error six months before the writ was sued out.

By section 726 of the Revised Statutes, the courts of the United States are empowered to grant new trials "for reasons for which new trials have usually been granted in the courts of law;" and by section 987 provision is made where judgment had been entered on a verdict, or a finding of the court on the facts, for stay of execution for forty-two days, on motion for time to file a petition for a new trial, and if such petition should be filed by leave within that time, execution

was further stayed as of course; and "if a new trial be granted, the former judgment shall thereby be rendered void." These sections were brought forward from sections seventeen and eighteen of the original judiciary act of September 24, 1789, and the latter section is supplementary and additional to the other.

At common law motions for new trial were made before judgment, but under the statutes of many of the States judgment is entered at once on the return of the verdict, and the motion for new trial made afterwards.

By section 5889 of the Compiled Statutes of Nebraska applications for new trial must be made at the term when the verdict is rendered, (except on the ground of newly discovered evidence,) and within three days after verdict unless unavoidably prevented.

The motion for new trial in this case was filed within three days after the return of the verdict, and seasonably within the rule of the state statute, or the common law rule, and, it is said, within the rule enforced by the United States courts in that district. No leave to file it was required, and as it was entertained by the court, argued by counsel without objection, and passed upon, it must be presumed that it was regularly and properly made. This being so, the case falls within the rule that if a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal. *Aspen Mining & Smelting Co.* v. *Billings*, 150 U. S. 31; *Voorhees* v. *Noye Manufacturing Co.*, 151 U. S. 135; *Brockett* v. *Brockett*, 2 How. 238, 249; *Texas and Pacific Railway* v. *Murphy*, 111 U. S. 488; *Memphis* v. *Brown*, 94 U. S. 715; *Northern Pacific Railroad* v. *Holmes*, 155 U. S. 137. In *Memphis* v. *Brown* the judgment was in mandamus, and a motion had been made to set it aside, which was denied, and thereupon the judgment was reëntered. The question here arose on a motion to vacate the supersedeas because the writ of error was not seasonably sued out within

section 1007, Rev. Stat., sixty days having elapsed since the judgment was originally entered, and Mr. Chief Justice Waite, delivering the opinion of the court, said: "Under the ruling in *Brockett* v. *Brockett*, 2 How. 241, the motion made during the term to set aside the judgment of March 2 suspended the operation of that judgment, so that it did not take final effect for the purposes of a writ of error until May 20, when the motion was disposed of. In addition to this, the form of the entry of May 20 is equivalent to setting aside the judgment of March 2, and entering it anew as of that date. This the court had the right to do during the term and for the very purpose of giving it effect for a supersedeas." No reference was made to any distinction between a motion for a rehearing in a suit in equity and a motion for a new trial in an action at law. Indeed section 1012 of the Revised Statutes provides that appeals "shall be subject to the same rules, regulations and restrictions as are or may be prescribed in law in cases of writs of error," and if the limitation on taking an appeal does not begin to run until after the denial of a pending petition for rehearing in an equity suit, it would seem to follow that this must be so as to bringing a writ of error after the overruling of a motion for a new trial.

The subject was much considered by Judge McCrary in *Rutherford* v. *Penn Mutual Life Insurance Company*, 1 McCrary, 120, where he held that "a writ of error will operate as a supersedeas if duly served within sixty days, Sundays excluded, after a motion for new trial has been overruled," and by Judge Sabin in *Brown* v. *Evans*, 18 Fed. Rep. 56, where the same conclusion was reached, and it was held that where a motion for a new trial had been made and entertained, the judgment in the case did not become final and effectual for purposes of review until the date of the order of court overruling such motion. And see *Alexander* v. *United States*, 15 U. S. App. 158, 169; *Scott's Administrator* v. *Stockton*, 41 U. S. App. 579; *Andrews* v. *Thum*, 33 U. S. App. 430.

"A judgment or decree to be final, within the meaning of that term as used in the acts of Congress giving this court jurisdiction on appeals and writs of error," said Chief Justice

Waite in *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, "must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered."

And in *McLish* v. *Roff*, 141 U. S. 661, 665, it was observed by Mr. Justice Lamar: "From the very foundation of our judicial system the object and policy of the acts of Congress in relation to appeals and writs of error, (with the single exception of the provision in the act of 1875 in relation to cases of removal, which was repealed by the act of 1887,) have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal."

The Circuit Courts of Appeals are governed by the same principles.

Unquestionably it is the general rule that after the expiration of the term all final judgments, decrees or other final orders of the court thereat rendered and entered of record, pass beyond its control unless steps be taken during that term by motion or otherwise, to set aside, modify or correct them. *Hickman* v. *Fort Scott*, 141 U. S. 415. But this motion for new trial was filed in due course and in apt time during the term at which the verdict was returned and judgment rendered, and this being so, the case came within the exception.

It is true that a writ of error does not lie from this court or the Courts of Appeals to review an order denying a motion for a new trial, nor can error be assigned on such an order because the disposition of the motion is discretionary; but the court below while such a motion is pending has not lost its jurisdiction over the case, and, having power to grant the motion, the judgment is not final for the purpose of taking out the writ. The effect of a judgment, entered at once on the return of the verdict, in other respects is not open for consideration. The question before us is merely whether a judgment is final so that the jurisdiction of the appellate court may be invoked while it is still under the control of the trial court through the pendency of a motion for new trial. We

do not think it is, and are of opinion that the limitation did not commence to run in this case until the motion for new trial was overruled.

The judgment of the Circuit Court of Appeals is reversed and the cause remanded for further proceedings.